IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1962

No. [redacted] 8

CHARLES TOWNSEND,
Petitioner,

vs.

FRANK G. SAIN, SHERIFF OF COOK COUNTY, AND JACK JOHNSON, WARDEN OF THE COOK COUNTY JAIL,
Respondents.

SUGGESTIONS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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A.

OPINIONS AND ORDERS IN THE COURTS BELOW.

In chronological order the following opinions and orders have been issued in the courts below:

1. (a) The defendant was convicted of murder in the Criminal Court of Cook County, and, after a full appellate rehearing, his conviction was affirmed by the Supreme Court of the State of Illinois, *People* v. *Townsend*, 11 Ill. 2d 30.

(b) *Certiorari* was denied by this Court (Douglas, *J.*, *contra*), *Townsend* v. *Illinois*, 355 U. S. 850.

(c) This Court denied a rehearing. 355 U. S. 886.

2. (a) The defendant applied for an order to set aside his conviction and for a new trial pursuant to the Illinois Post Conviction Hearing Act (R. E12). The trial court dismissed the petition (R. E3).

(b) The Supreme Court of the State of Illinois denied defendant's application for a writ of error, in an unreported order, because:

(i) "• • • the injection of hyoscine and phenobarbital was carefully considered by us in resolving the issue of the validity of petitioner's confession;" (R. A30), and

(ii) not only were hyoscine and scopolamine identified as the same drug at the trial, but "the mere fact that the drug which was administered to petitioner is known by two different names presents no constitutional issue" (R. A31).

(c) This Court denied *certiorari*, unanimously, *Townsend* v. *Illinois*, 358 U. S. 887.

3. (a) The defendant then commenced the proceedings below under the federal Habeas Corpus Act, asking that court to "grant petitioner a full hearing," and praying for an order setting aside his conviction and for a new trial, verbatim with the prayer of his state post conviction petition (R. A20 and E21-22). The district court discharged the rule to show cause and dismissed the petition for a writ of *habeas corpus* (R. A39).

(b) The Court of Appeals for the Seventh Circuit affirmed that order, *United States ex rel. Townsend* v. *Sain*, 265 F. 2d 660.

(c) This Court entered an order granting *certiorari*. Contemporaneously it vacated the order of the Court of Appeals, and remanded it. The citation of *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276, in that order informed the courts below that, examination of the entire state court record is a *sine quo non*, to denial of relief in federal *Habeas Corpus*. *Townsend* v. *Sain*, 359 U. S. 64.

4. (a) Upon remand, these respondents amended their answer by appending "the entire and complete records of petitioner's state court conviction [Vols. B, C and D] and his state court post-conviction proceedings" [Vol. E] (R. F135). The district court, from an examination of the "state criminal and post-conviction proceedings," "is satisfied upon the full records before it that the findings of the state courts, that the challenged confession was freely and voluntarily given by petitioner are correct, and that there has been no denial of federal due process of law" (R. F136). The district court ordered the "Rule discharged and petition dismissed" (R. F137).

(b) The Court of Appeals for the Seventh Circuit also reviewed these state court records, and from them related, "the basic undisputed facts." *United States ex rel. Townsend* v. *Sain*, 276 F. 2d 324, 325, 326. The Court of Appeals affirmed the district court (276 F. 2d at 330), after charging that,

> "petitioner goes far beyond what appears in the records of the state courts in his case as to the effects of the injection of hyoscine and phenobarbital to relieve one who is suffering from the results of narcotics withdrawal."

Additionally, the court characterized the expression, "truth serum," as "borrowed * * * from the jargon of science fiction" (276 F. 2d at 329).

(c) The Court of Appeals affirmed the order of the district court on April 7, 1960 (see order filed in *Townsend* v. *Sain*, No. 219, Oct. Term, 1960). These respondents resisted on May 13, 1960, the recall of the mandate of the Court of Appeals; the gratuitous return of the state court records to the federal courts; and, the extension of time to file the application for a writ of *certiorari* in this Court. (See: Suggestions in Opposition to Motion for Extension of Time, filed July 1, 1960.)

(d) This Court granted the extension to July 14, 1960, when this application here was filed.

B.

JURISDICTION OF THIS COURT.

The petitioner here invoked the jurisdiction of the district court, pursuant to chapter 153 of the Judicial Code; specifically, because he claimed he was a prisoner in an Illinois Penitentiary, "in violation of the constitution • • • of the United States" (28 U. S. C. A. 2241(c)(3)). This Court may exercise its jurisdiction pursuant to statute (28 U. S. C. A. 1254(1)).

The final order of the Court below was entered April 7, 1960. This Court granted an extension to July 14, 1960, for the filing of the application here.

C.

CONSTITUTIONAL PROVISION.

The gravamen of the petitioner's claim lies in the interdiction of the 14th Amendment to the Constitution of the United States: "Nor shall any State deprive any person of life, liberty, or property without due process of law • • •" (Section 1).

The respondents did not in the courts below, state or federal, and do not in this court suggest or maintain, that a drug-induced confession is either competent evidence, or that it lies within state or federal constitutional concepts of due process. The respondents recognize and respect that principle whether the drug which inspired the confession is administered from proper motives, or with malicious intent.

D.

QUESTIONS PRESENTED FOR REVIEW.

1. May the district court in a federal *habeas corpus* proceeding accept the state trial record in support of finding federal due process; or, must it, notwithstanding this court's order in *Rogers* v. *Richmond*, 357 U. S. 220, take other, additional testimony simply because the petitioner urges it?

2. Where the state court trial record effectively rebuts the petitioner's allegations of denial of federal due process, must the district court nevertheless permit other, additional testimony in order to rule on federal sufficiency?

3. Do the petition and a traverse, which admits "the factual allegations of the petition well pleaded, but deny that petitioner is held in custody * * * in violation of the Constitution or laws of the United States" (R. A28), supplant the state court trial record, in the determination of whether the petitioner was accorded federal due process?

4. Was the petitioner denied federal due process when after extensive hearing, the state trial court ruled a confession voluntary, and a jury after receiving equally extensive testimony accepted the confession as credible.

The confession which was given orally (but, subsequent to medical treatment requested by the petitioner who was discomfited by a narcotics withdrawal reaction, and who was treated by a physician called by the police to treat him, and who gave him the same treatment, effective over a period of fourteen years to some thirty-five hundred narcotics addicts, and, which consisted of about 2 ccs of sterile solution into which was dropped ¼ grain of sodium phenobarbital and 1/230 grain of hyoscine hydrobromide, which he injected by hypodermic needle into the shoulder of the petitioner), was taken by an Assistant State's Attorney,

recorded by a professional reporter, transcribed in four typewritten pages, and signed by petitioner some fourteen hours after it was given?

5. Whether this Court must make the fact declaration that two ccs of sterile solution into which are dropped ¼ grain of sodium phenobarbital and 1/230 grain of hyoscine hydrobromide, injected into the shoulder of a person in need of that proper medication, who subsequently confesses to a crime, has been denied federal due process, if the confession is used at a later trial for the crime confessed?

E.

STATEMENT OF THE CASE.

In an effort to present to this Court, as was presented to the courts below, a coherent statement of the record facts developed in the trial of the defendant on his indictment, the respondents here set forth in narrative form the developments in the state court. These facts are divided into three sections called "Undisputed Record Facts" (*infra*, pp. 6-13), "Disputed Fact Issues Created" (*infra*, pp. 13-23) and "Expert Testimony" (*infra*, pp. 23-29). (The "R" designation refers to the 3-volume record pages of petitioner's criminal court conviction (B, C, D).)

Undisputed Record Facts.

The material undisputed record facts (R. 597-642) disclose that Jack Boone, Sr., about 43 years of age, a steelworker living with his wife and their two boys at 3754 S. Michigan Avenue, Chicago, left for work at a steel mill the morning of December 18, 1953. The building in which he and his family lived, an apartment house, was set back from the sidewalk about 100 feet and was reached by walking along a narrow passageway, dimly illuminated,

but wide enough to accommodate a car, adjoining a neighboring building. About 6 o'clock that evening, another occupant of the building and a friend of the Boone family, Helen Clark, discovered the senior Boone lying in the passageway, face down, with blood on the back of his head behind his right ear. Boone's wife was called and Boone taken first into the family apartment and then shortly afterward to a hospital where on December 21, 1953, he died.

When Boone had left for work that morning of December 18, he wore no wrist watch, which his wife kept, and had a pocket wallet and about $4 on his person. The wallet was discovered on December 19, at about 10 or 11 a.m., in an apartment building at 117 East 37th Place, by a 12-year old boy living in one of the apartments of the building, which was not too far from the building occupied by the Boones. The boy gave the wallet to his father that same morning, a Saturday, and the father gave it to a cousin of his wife who in turn gave it to Mrs. Boone, and Mrs. Boone turned it over to a Chicago police officer, George Martin, on January 5, 1954.

On December 29, 1953, Chicago police had arrested and taken into custody one Vincent Campbell (R. C769-771), later convicted, sentenced and committed for robbery (R. 761). While still in police custody the early morning of January 1, 1954, he accompanied police officers George Martin, John Fitzgerald, Edward Cagney and Joseph Corcoran in a squad car to the vicinity of 35th and South Indiana, where he identified petitioner Charles Townsend walking with a friend for the police officers (R. C643-5, C757-8). From his uncontroverted testimony at the trial, it appears that Campbell knew Townsend well; that about the middle of December, 1953, on a weekend, probably a Friday, although he could not recall the exact date, he saw Townsend in the neighborhood, walking along, a

housebrick in his hand. He asked him how he was doing, and Townsend said he was going to make some money. He next saw Townsend some 3 or 4 hours later in a billiard hall at 35th and South Prairie. Townsend came in carrying a brown paper bag, torn at one end, wrapped around a housebrick, which he laid on a bench nearby, and asked to play with them (R. 745-62).

When arrested January 1, 1954, at about 1:45 a.m., petitioner was 19 years of age and a confirmed heroin addict since about 1952 sometime, less some months during the forepart of 1953, and by December, 1953, often was taking as much as 6 capsules of heroin daily (R. B92-3, B158-61, C811). At about midnight, or 1½ hours prior to his arrest, he had injected himself intravenously with 2½ capsules of heroin (R. B93, B192, B810). Except for a period of 8 or 9 days that he worked intermittently in a restaurant, petitioner had been unemployed throughout 1953 (R. B160-1). According to the further testimony of the director of the behavior clinic of the criminal court of Cook County, who supervised petitioner's court-ordered psychological and mental condition shortly before his trial to determine his ability to cooperate with his attorneys and conduct his defense, petitioner's diagnosis showed a character disorder and drug addiction, and a formal psychological I. Q. of 63 was determined for him (R. C782-4, D1027), which translated in terms of his mental I. Q. attained for petitioner a range between 75-80, still in the area of border-line or below average intelligence, classifying as a mental defective, but legally sane, and comparing favorably to the World War II U. S. Army average mental I. Q. of 78 (R. D1027-30).

The police officers took petitioner in their squad car to the 2nd district police station at 29th street and South Prairie, where they arrived at about 2:30 a.m., and where for 5 or 10 minutes petitioner was asked his name, address,

and so on by the lockup keeper who made out the arrest slip (R. B95, B251-2, B256). Townsend was wearing a dark suit (R. B398), tieless, with a sport shirt (R. B347), neatly dressed, and replied to the questions of the lockup keeper clearly and coherently (R. B253). Then petitioner was taken by the four arresting officers to one of the detectives' rooms of the station, close-by, and there questioned for 30 or 35 minutes by officers Fitzgerald, Cagney and Corcoran concerning various crimes which petitioner denied having committed (R. B96, B253-4, B281, C647, C656). Following his removal from the detectives' room he was placed in the women's cell, alone, and at about 5:00 a.m. removed for transfer to the 19th district station, located near 35th street and South Wentworth avenue, where he arrived about 5:10 a. m. (R. B97-8, B170, B254, B257, B262). He was interrogated by no one there and he remained there until that evening, sometimes lying on his bunk, sometimes sleeping or sitting on it, when he was returned to the 2d district station about 8:30 p.m. (R. B98, B100, B170, B269, B270-3).

About 8:30 p.m. petitioner was removed from his cell by officers Cagney and Fitzgerald (R. B99-100, B273). Sometime thereafter, a show-up was conducted in one of the three detectives' rooms, with petitioner and three other prisoners viewed by an insurance agent, Gus Anagnost, who identified one of the other three as the man who had robbed him and then left the room (R. B102-4, B292, B349-55, B423-4, B476-7). Immediately thereafter a fight broke out between Townsend and the other prisoner identified just previously by the insurance agent (R. B355, B426-8, C704-5, C826-7). Townsend was not injured (R. 357). All four arresting officers witnessed the show-up which lasted about 10 minutes (R. B295, B349, B423-5, B477-8).

Petitioner shortly thereafter was questioned in the same room, without the other prisoners present, by officer Cagney

about the Boone killing and other matters for at least 10 minutes (R. B107, B347-50, B649-52). At least up until the time of the show-up defendant's appearance and statements to the several lockup keepers at the 2d and 19th district police stations, the several policemen who had driven him to and from the stations and back to the 2d district station, and to the arresting officers were neat and normal in appearance and clear, distinct and coherent in speech and conversation (R. B252, B260-1, B263-4, B267, B276, B322, B347, B422-3). As early as shortly after his arrest, he had admitted that he was a narcotics addict to the arresting officers, and that he had only 1½ hours earlier given himself a shot, although he complained to no one, at least up until the time he had been returned to the 2d district station at about 8:30 p. m., that he was sick (R. B99, B267, B270, B273, B323, B355, B358, B422). It was sometime during the questioning by Cagney, although it is disputed whether in one of the cells or in the detectives' room, that petitioner complained of "stomach" pains, was occasionally holding his abdomen, and Cagney then telephoned from the station for a doctor (R. B108, B109-10, B352-3, B357-8, B360-1).

Shortly afterward the doctor came, a police surgeon assigned to the central police station located at 11th and State streets (R. B111, B211). Earlier, an assistant state's attorney had arrived at the 2d district police station (R. B296, B352, B430-1, B447, B479, B481). When the doctor arrived he entered one of the detectives' rooms where petitioner was waiting (R. B112-6, B334). Cagney was present (R. B116, B334, B367-8) when the doctor examined petitioner, after requesting him to unbutton his shirt, testing his heart and eyes, and when he used a hypodermic syringe to inject a solution into petitioner (R. B111-3, D982).

Before making the hypodermic injection, the doctor asked Cagney to obtain a glass of water, then rinsed the needle

and syringe in the saline solution, having first dropped into the glass a sodium chloride tablet. Then he withdrew about 2cc.'s of sterile solution into the syringe from a little bottle, dropped a 1/8 grain of sodium phenobarbital and a 1/230 grain of hyoscine hydrobromide into the syringe solution to dissolve them and injected the solution into petitioner (R. B112-3, B214-5, B240, D981-2, D988-9). He left four ¼ grain phenobarbitals, five according to petitioner's testimony, giving them to petitioner, and instructed him to take two around midnight and the others in the morning. Petitioner took two that night sometime and the remainder the next day (R. B114-5, B126, B198, B216, B235, C835, C850-1). While on the preliminary hearing petitioner testified that he was neither questioned by nor saw an assistant state's attorney that evening or before sometime in the afternoon of the following day, January 2, at the state's attorney's office in the criminal court's building at 26th street and south California avenue, he later testified on the trial that he could not remember seeing the assistant state's attorney before January 2, and then, through impeachment by way of a transcript of his testimony in his earlier trial under indictment No. 54-10 tried in 1954, admitted that he had previously in the earlier case testified under oath that he had seen and given a statement to the assistant state's attorney the evening of January 1, at the 2d district police station (R. B132, C877-902).

When the doctor left, and sometime afterward, he was returned to his cell, although it is disputed whether he was again removed and taken again that evening to one of the detectives' rooms before finally being locked up for the night (R. B122-5, B172-7, B272-3, B297-304).

He was not questioned or disturbed until sometime between 11:00 a. m.-1:00 p. m. of the following day, Saturday, January 2, 1959, when he saw and talked with Cagney and Fitzgerald and the other two arresting officers, Corcoran

and Martin (R. B126-33, B275-6, B305, B375, B393-4, B429, B482), at which time he was told he would be going to the state's attorney's office. He was taken there in a police car by officers Cagney, Fitzgerald, Corcoran, and one Ellington who was not a police officer but a witness (R. B133-4, B177-8, B305, B375-6, B482). They arrived at the state's attorney's office, where they saw the assistant state's attorney who had been at the 2d district station the night before (R. B133-4; B178-9, B306-8, B339, B376, B441). There, after having been given a copy of a transcribed typewritten statement consisting of four pages by the assistant state's attorney, and having been asked by the assistant to read petitioner's copy while the assistant read the original transcription, petitioner signed each page in the presence of the assistant, and in the presence of Cagney and Fitzgerald who witnessed petitioner's signature to People's Exhibit 2 in evidence (R. B135-6, B286, B288-9, B306-7, B339-41, B376, B442-4, C714-5, C717, C737, C739-43). This transcribed confession, which was read into the record before the jury (R. C739-43), shows that before making his answers to the questions to tell the truth he acknowledged that no threats or promises had been made to induce his confession. After signing his confession, petitioner was returned to the 2d district police station where he arrived about 3:00 p. m. of the same day, Saturday, January 2 (R. B138, B307, B311, B394). The lockup keeper observed nothing unusual about petitioner's appearance upon the latter's return, talked to him briefly, and petitioner spoke coherently and didn't complain about anything (R. B394-5).

Sunday, January 3, all four arresting officers questioned petitioner from time to time, removing petitioner each time from his cell and taking him to the detectives' room, beginning about 10:00 a. m. and irregularly thereafter up until about 4:00 p. m. (R. B277, B312-6, B434-5, 489). That

evening he asked Cagney to get the doctor for him again, telling Cagney that he was not feeling too well, and Cagney again telephoned for the doctor, the police surgeon who previously had treated petitioner, and the doctor arrived that evening (R. B138, B229-1, B387-8). Petitioner told the doctor that he was not feeling too well and was given a number of white tablets, each ½ grain phenobarbital, to take orally (R. B139, B221, B239, C850-1).

The following morning, Monday, January 4, petitioner was taken to the coroner's inquest at the Cook county morgue, which was open to and attended by the public, among whom was his sister, the assistant state's attorney who had previously taken the statement from him, and the four arresting police officers. Petitioner there under oath, and after being advised of his rights not to testify and that any statement made by him might subsequently be used as evidence against him, proceeded again to confess the Boone murder (R. B143-8, B178-81, B184, B316-7, B380-1, B383-5, B433-5, B445, B488, C692, C905).

Disputed Fact Issues Created.

Petitioner, either by his testimony at the preliminary hearing or later at the trial, or on both occasions, made statements, contradicted or disputed by the testimony and evidence of the prosecution, which give rise to the issues in the *habeas corpus* proceeding.

Petitioner testified that when taken to the 2d district station, following his arrest the early morning of January 1, 1959, he was shortly interrogated by officers Cagney and Fitzgerald for about 5-10 minutes about the Boone murder and denied any knowledge of it (R. B95-96), and that he was interrogated for a total of 30 minutes (R. B96). He was again interrogted about 4:00 or 5:00 a. m. of that same morning before leaving for the 19th district

station (R. B97). Questioning was resumed at the 2d district station by officers Cagney and Fitzgerald, Martin and Corcoran, at about 9:00 p. m., following his return that same day (R. B99, B101, B156-8). While he did not complain to anyone, he had not been fed or given anything to drink up to this time (R. B99, C816), although he later testified at the trial that he had drunk some water (R. C816). He otherwise testified only that one of the 2nd district station lockup keepers came around with sandwiches sometime Sunday, January 3 (R. B141).

Before being questioned, however, there was a show-up first, in which he stood with Vernon Campbell, George O. Jackson and Theodore Redd, while they were viewed by an insurance man who identified Redd as his robber (R. B102, C823). (Then officer Cagney stepped out of the detectives' room with the insurance man into the hallway and petitioner heard Cagney telling the insurance man that he had identified the wrong man, that he should have put the finger on petitioner, while the insurance man was telling Cagney that he himself should know who had robbed him and that he had correctly identified Redd.) (R. B102-4.) Officer Fitzgerald, who also had gone out of the room, then returned and hit petitioner in the abdomen, saying that petitioner knew he was the one, and petitioner fell to the floor, on his knees, and vomited water and blood (R. B105-6, C827). (Earlier, at the same time, or shortly thereafter, petitioner does not clearly indicate, except that after his return to the 2nd district station, first Fitzgerald and then Cagney slapped his face [R. C819, C821].) Earlier (it is to be supposed), following the identification by the insurance man, petitioner had turned to Redd and asked him if he was satisfied, since the other three prisoners in the show-up with him had "told lies" on him, and he and Redd started to fight and struggled to the floor where they were finally separated by the police officers (R. C826-7).

Shortly thereafter, the police officers began to question him again and then returned him to his cell (R. B107). Then Cagney talked to petitioner in his cell for 5-10 minutes, asked petitioner if he was sick and petitioner told him he was sick from using narcotics (R. B107-8). About 5-10 minutes later he saw Cagney in the detectives' room and Cagney told him that he would call the doctor (R. 110). Shortly after that the doctor came in the room (R. 111), but not before first stopping in the hallway and conferring with the police officers, defendant charged (R. B112). This was about 10:00 p. m. and the doctor did not stay longer than a few minutes (R. B114, B171). He told petitioner to unbutton his shirt, checked his heart, looked at his eyes, and opened a little black bag and took out some powder. This he put in a syringe and dissolved it with water, then tied petitioner's left arm with a rubber band until a vein bulged and injected the solution into the vein (R. B112-3). The doctor then gave him five pink or red pills or capsules to take, two then and the others in the morning (R. B114-5, 197-8). He took three with water (R. B115, B198). All four arresting police officers were present at the time, and Cagney then asked him how he felt, and he said "all right" (R. B116-7). Up to that time he had denied all criminal accusations (R. B111).

Then they brought in the insurance man again, and by this time he was feeling "dizzy, sleepy, in other words" (R. B117, B119). He could see, but no more than two feet in front of himself, although he had been able to see all right before getting the drug injection, and things now looked dim, and he could no longer hear too well (R. B118-9). He heard someone saying something to him, telling him to tell the insurance man that he had robbed him, and he said, yes, and he does not know why he said that (R. B120). He had no memory after the drugs (R. B151).

The next thing he seemed to remember is having sat

next to a desk and seeing a person he did not know, and he wanted very badly to sleep and actually fell asleep once but was awakened by Cagney near him (R. B121-2). He still could see only badly. Cagney handed him a pen and told him to sign his name "here," and he asked if he was going out on bond, and Cagney said, yes, that was it. He can not recall what he signed (R. B122-3). Then he was taken back to his cell, he assumes, because he can remember only that Cagney came to get him again, waking him and taking him back into the detectives' room (R. B123, B172-5). There were quite a number of people in the room, and bright lights were flickering in his face, and he could not recognize anybody or see very well (R. B123, B176). He was sitting and was told to hold his head up. Cagney standing near him told him to hold up his head and then went away, and the lights flickered for a minute or so and he was again returned to his cell where he was left undisturbed the remainder of that night (R. B124-5, B176).

He took the rest of the pills the next afternoon, Saturday, January 2 (R. B126). Up to Saturday morning he did not remember having confessed to anyone that he murdered Boone. His head was now much clearer (R. B126). But when he saw Cagney that morning while in his cell about 10:00-11:00 a. m., Cagney showed petitioner his picture in a newspaper and asked him to read it, and he did and he read that he had confessed last night (R. B123, B127). Then he was taken to the detectives' little room again and there questioned by Fitzgerald and, afterward, by Cagney and the other two, about all the robberies and murders around 35th street and he confessed to all of them (R. B128-30). Then he was told that he was going to the state's attorney's office (R. B131).

No assistant state's attorney had talked to him prior to this time, and he couldn't remember any statements he

had made Friday night that Cagney told him he was going to sign at the state's attorney's office (R. B132-3). He had no clear memory again until Saturday afternoon (R. B152). The assistant state's attorney he later saw that afternoon at the criminal court's building he had never seen before (R. B135). The assistant handed him some papers and asked petitioner to read along with him. He was still half-asleep, could not see as well as ordinarily and neither could make out the words on the papers nor understand what the assistant was reading (R. B135). Cagney then asked him to sign and he signed without objection, he did not care, although he does not know why (R. B136). Then he was returned to the 2d district station (R. B138).

Earlier at the station he had told Cagney that he was not feeling well. The papers he signed he did not read and did not know what they were (R. B138).

When he saw the doctor again Sunday night, the following day, January 3, he told the doctor he was not feeling well and received 6 or 7 white pills that looked like aspirin, and was instructed to take four at that time and the rest the following morning, Monday (R. B139, C850-1). After that his eyes refused to stay shut and he could not sleep at all, but took the rest of the pills Monday morning (R. B140, C850-1).

Monday morning, January 4, he went to the inquest, but not before Cagney had again taken him into one of the detectives' rooms, where the other arresting officers were present, and asked him if he could remember his confession of Friday night (R. B140-3). And he said, "I don't even remember making no statement at all," and with that all the police officers laughed (R. B143). So Cagney read the statement to him, and later in the police car told him not to change his statement at the inquest that he had made (R. B143). Then at the inquest he testified and admitted the Boone murder (R. B148).

In 1953, he testified, a heroin injection gave him a high sensation and then gradually faded out from the initial greater effect in about 45 minutes (R. B194-5). After 4 5 hours the effect completely wore off and he would come ill, get nervous and begin to sweat, with slight ins in stomach and chest, and he experienced all of these nptoms of narcotic withdrawal on January 1, 1959, be- e the doctor visited him (R. B196).

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he controverted testimony and evidence for the prose- on was that defendant was not specifically questioned at the Boone murder until about 9:00 p.m. Friday, uary 1 (R. B372-3, C647-9, C656), and at that time in ver to one of Cagney's specific questions admitted the ne murder and robbery (R. C649-652). He was being for investigation of several murders and robberies (R. 1). Nor was he questioned again concerning anything around 4:55 a.m. Friday when he was transferred to 9th district station (R. B254-5). At the 19th district on, he was offered a sandwich by the lockup keeper but ed it (R. B267). The arresting police officers, now nd then another, questioned petitioner after the short -up and until the arrival of the assistant state's attor- (R. B348-52).

e show-up began at about 8:45 p.m. (R. B423, B427,) and lasted about 10-15 minutes (R. B478). In the -up with petitioner were Vernon Campbell, Oliver son, and George Hare (R. B292, C682). The Metro- an Life insurance agent identified Oliver Johnson and and never was brought back (R. B292, B353, B424, 8). None of the police officers thereafter talked to or the insurance agent to change his identification, or urn, or later caused petitioner to admit he robbed him 293, B336, B353-4, B425-6, B479). After the insur-

ance man stepped out, and was led out by officers Fitzgerald and Cagney, petitioner laughed and Oliver Johnson said, "What do you want to do me like that for?" and then swung at Townsend with his fist until they ended wrestling on the floor and were separated by officers Corcoran and Martin just before the commotion brought Fitzgerald and Cagney back into the room (R. B355, B426-7, C704-5, C774). A short time later Townsend said to Oliver Johnson, "Don't worry, man, I'll take you off the hook" (R. C705). Then Vernon Campbell said to Townsend, "Charley, why don't you tell the truth and tell them you are the guy that is going around hitting people on the head with a brick?" (R. C705-6).

The arresting police officers and lockup keepers denied that at anytime earlier, or at the show-up, or following it, they in any manner struck, hit, threatened or otherwise abused the petitioner, themselves, or saw any other police officer do so in their presence (R. B255, B283, B334-5, B337, B340, B417-8, B467-8). Nor, the police officers and lockup keepers testified, did petitioner during that period complain in any manner (R. B255, B267, B270, B273). Further, the arresting police officers all testified, no promises of any kind were made that they would attempt, in return for his confession, to get morphine for him, send him to the hospital, or get a doctor or see that he would obtain lenience or immunity from prosecution (R. B283, B284, B334-6, B337, B341-2, B418, B468, B470). None of them saw petitioner vomit water or blood or saw any blood or water (R. B283-4, B294, B335, B418, B433, B467). The two janitors who worked the material shift on the morning of Saturday, January 2, beginning at 6:00 a. m., found no blood or water in any of the detectives' rooms (R. B401-8, 410-14). During the period in question, petitioner further did not appear nervous, sweat or exhibit other unusual behavior; rather, he spoke coherently and otherwise behaved quite normally (R. B322-4, B347, B359, B362, B423, B479-80).

Sometime not too long after the show-up, however, defendant did begin to complain and asked to see a doctor, and began to complain of abdominal pains and was holding his abdomen with his hands occasionally and leaning over (R. B353, B355, B357, B360-61, B428). He asked for a "jolt" (R. B353, 428). He also wanted a doctor and Cagney called for the police surgeon. Prior to the latter's arrival, the assistant state's attorney arrived about 9:30 p. m. (R. B352, B430-31, B447, B481). He saw petitioner in one of the detectives' rooms in about 5 minutes (R. B297, B447). The assistant, in Cagney's presence, asked the petitioner a few questions but petitioner stated that he would rather not talk until he saw a doctor and meanwhile was nervous, complaining of abdominal pains. The assistant asked petitioner if he wanted a doctor and petitioner said, yes, and then Cagney stated that he had already called for the doctor. The assistant left the room and the doctor came shortly (R. B358-66, B447-9). The doctor was directed to the detectives' room by the desk sergeant when he arrived about 9:45 p. m. and spoke to none of the arresting police officers before seeing and administering to petitioner in Cagney's presence (R. B223-4, B284, B293-5, B334, B359, B366-8, B429-31, B449, B469, B479).

The police surgeon thoroughly examined Townsend's chest, back, neck, head, face, arms, hands, and palpated over petitioner's chest with his hand and fingers, and then used his stethoscope. He asked petitioner about the marks on his left arm and Townsend then explained that he was sick because of narcotics withdrawal and described his pains for the doctor. The doctor further observed a cold perspiration over Townsend's face, neck, body and arms. He diagnosed petitioner's symptoms as resulting from drug addiction and withdrawal (R. B212-5). He dissolved a tablet (sodium phenobarbital) and a piece of a tablet, not powder (hyoscine), in the syringe, and after the

injection gave petitioner white tablets, not pink or red, and gave him four only (R. B214-7, B235-6). The doctor did not tie a rubber band or anything around petitioner's arm but injected the drug solution into the shoulder muscle of petitioner's left arm, not in any of the veins of his arm. (R. B368, D982). Examination by the doctor disclosed no bruises on or about the body, and petitioner neither complained of any nor of nausea (R. B222). Nor could he see or smell any evidence of vomit (R. B223). Following the injection, petitioner said he felt better (R. B370). He put the four tablets given to him by the doctor in one of his pockets and took none, if any, until midnight or thereabout (R. B304, B341, B370).

Petitioner had not specifically been questioned about the Boone murder until about 9:00 p. m. for the first time since his arrest (R. B372, B433, B656). Following the doctor's treatment and immediate departure thereafter, which was about 10:30 p. m. (R. B216, B298, B370, B456), petitioner was again visited by the assistant state's attorney, who either then or earlier had already been introduced as such to petitioner (R. B371, B450), and was questioned by the assistant about 25 minutes (R. 372). The assistant asked Townsend how he felt, that petitioner replied, all right, and observed that Townsend, earlier before the doctor's arrival had been shaking a little and complaining of cold chills (R. B448, B450, B456), now exhibited a normal appearance and spoke more strongly (R. B455-7). He did not know what the doctor had administered to petitioner, if anything, but knew petitioner had been seen by the doctor (R. B451). He would not have questioned petitioner if he had known that the doctor had given petitioner anything to affect adversely his mental processes (R. B452-4).

Thereafter, petitioner, the assistant and Fitzgerald and Cagney, two of the arresting police officers, including now a court reporter employed by the state's attorney's office,

went into another of the detectives' rooms, a larger room, where there was a desk and petitioner's confession concerning the Boone murder was dictated to the court reporter for about 10 minutes, beginning about 11:15 p.m., and where only the assistant questioned petitioner who answered clearly, distinctly and coherently (R. B282, B298-9, B301, B370-73, B391-2, B439-40, B444-5, B457-9). None of these saw or observed petitioner pushed or shaken awake, or asleep, or abused him, or threatened or promised him in anyway or thing in connection with his confession, or held his head up, or heard complaints concerning petitioner's vision, and petitioner in fact was sitting quite erect (R. B302-3, B336-8, B441, B459). Petitioner was returned to his cell about 11:45 p. m. that night, January 1, and was questioned no further that night (R. B275-7, B304, B374-5, B481). The assistant state's attorney had left about 11:30 p. m. (R. C726-7).

The arresting police officers testified that none of them, nor anyone in their presence, ever gave papers to petitioner to sign or put a pen in his hand, or in any manner induced him to or saw him identify himself to the insurance agent as the robber, or see lights flickering the evening of January 1, or any other time, or show him a newspaper the following morning, Saturday, January 2 (R. B285-6, B336-8, B418-9, B469, B472, B487). No newspaper photographs were taken until later that Saturday afternoon while petitioner was going into the state's attorney's office and later at the inquest (R. B380).

At the state's attorney's office that Saturday afternoon, January 2, petitioner was given a copy of the confession to the Boone murder stenographically recorded Friday night and now transcribed and typewritten and appeared to be following the assistant state's attorney while the latter read from the original. Townsend then signed each of the four pages. He did not appear sleepy or complain in any

manner. Nor was petitioner abused, threatened or promised anything to obtain his signatures (R. B286-9; B308-10, B340-41, B376-9, B440-45). On Sunday, January 3, in the evening, the doctor gave petitioner only two more 1/4 grain phenobarbital tablets (R. B238-9).

The police officers denied that at anytime Saturday they questioned petitioner further about the Boone murder (R. B311-6, B432-5, B438, B489), or in anywise prompted him either before the visit to the state's attorney's office or before his appearance at the coroner's inquest, afterward, on Monday, January 4, where petitioner for the fourth time since his arrest again confessed the Boone murder (R. B287-8, B315-7, B339, B341-4, B418-9, B471-2).

Expert Testimony.

Dr. Mansfield, the police surgeon testified that hyoscine is a drug used many times by him to depress and sedatize drug addicts, as well as people of psychopathic tendency (R. B215). A sedative is a drug or medication utilized and given to quiet a person, settle his nerves or put him to sleep (R. B224-5). Phenobarbital is also a sedative and, because a barbiturate, too, it is also an anodyne or pain-deadener (R. B225-6). However, in this case he considered it the sedative, while hyoscine principally the anodyne (R. B225-6).

He had examined about 20,000 narcotics addicts in his experience, about 70% of those on heroin (R. B217-8), and had treated about 6-7,000 cases of narcotics withdrawal (R. B218). And in about 50% of that number had used the same injection and treatment he administered to petitioner (R. B218, D1010).

Acute withdrawal symptoms, he testified, include complaints about pain in the abdominal area usually, of sickness, weakness, and an inability to remain emotionally still.

The patient is restless, talkative, moist perspiration usually covers his face and body and in severe cases he will vomit on the least provocation. He cannot keep water down, nor take food—in fact, he will refuse food, except sweets like candy or chocolate—and he desires quiet. He suffers spells of quietude and sleep, then wakefulness with hilarious screams and yelps (R. D1017-8).

The phenobarbital, based on his experience, combines very well with hyoscine in the proportion and quantity used to quiet the addict, to pacify his mind, to delay emotions of hilarity, noisiness and excitation (R. B215-6), without putting him to sleep (R. B215-6, B228). The addict in withdrawal is suffering from a nervous reaction (R. B247), and the small amount of phenobarbital injection counteracts the activity of the sympathetic nerves, expecially in the abdominal area (R. B243), while the hyoscine relaxes (R. B226-7). The combination given rests and relaxes the subject (R. B227, B243, D1019).

He could recall no case in his experiences where his use of the drug hyoscine produced amnesia or loss of memory and considered that the injection used on Townsend, alone or together with the sodium phenobarbital tablets for oral administration, could not have resulted in loss or lapse of memory in the case of petitioner or have impaired his vision or otherwise adversely affected his mental condition to the point of depriving him of his will or putting him to sleep, and denied using the drugs for that purpose (R. B216, B218-20, B228, B231-2, D982-3, D1001, D1010). He used the injection and treatment in question because petitioner was tense and firm (R. B226). In order to sedatize completely and narcotize petitioner he would have to have administered 3 or 4 grains of phenobarbital (R. B233) or a 1/8 grain of hyoscine (R. D988-90), or 1½ to 2 grains pheno to put him to sleep (R. B243). To create amnesia would require 1/100 of a grain of hyoscine, to so-called normal

dose, plus another 1/60 of a grain of hyoscine, or a large dose of phenobarbital and hyoscine combined (R. D1008-9).

On cross-examination during the preliminary hearing, the colloquy ran as follows at one point (R. B228):

Q. You gave him something that would knock him out?

A. No, sir.

Q. Doctor, you testified before, in a case where this man was being tried?

A. Yes.

Q. Did you give him any truth serum or anything—

A. No.

Q. —that you considered that?

A. No.

Q. You never told anybody you did that?

A. I never saw any in my life.

When Dr. Mansfield, the police surgeon, next saw petitioner on Sunday evening, January 3, Townsend said, "that medicine I gave him the other night didn't help him any." (R. B221.)

Dr. Harry R. Hoffman, also a physician licensed to practice in Illinois, since 1910 (R. D1154-5), and a specialist in nervous and mental diseases who in 1931-41 organized the behavior clinic of the criminal court of Cook County, and presently on the staff of the clinic (R. D1156-7), testified for the prosecution on the trial in rebuttal and stated that he had treated hundreds of narcotics addicts and used hyoscine in his practice many hundreds of times, as well as phenobarbital, many thousands of times (R. D1157-8). He has observed no case where hyoscine in normal dosage caused amnesia (R. D1159). Further giving his opinion upon the hypothetical person posed (*i.e.*, Townsend for effects and purposes), he stated the injection in question could not have caused amnesia, nor put the subject to sleep (R. D1160-65). He referred to an old text, Lambert Towns Treatment of

Drug Addicts, which advocates use of hyoscine (R. D1168). He himself has never used hyoscine in narcotics cases (R. D1167-8). He considered the drug's effects upon a confirmed narcotics addict would be less pronounced than upon a normal individual (R. D1172), although a similarity of symptoms, *e.g.*, dryness of mouth, some difficulty in accommodating in vision, depending on the amount given (R. D1169).

On further cross-examination, the following colloquy occurred, with reference to the doctor's early use of hyoscine in treating palsy patients while a student at Rush Medical College and while working in the out-patient clinic (R. D1173):

Q. What do you give it to palsy patients for?
A. It has an effect on involuntary movements of the individuals.
Q. Now, doesn't hyoscine also create twilight sleep, Doctor?
A. In conjunction with morphine scopolamine, or hyoscine and morphine, twilight sleep, yes, sir.
Q. Well, what does that word mean?
A. Scopolamine or hyoscine are the same.
Q. Scopolamine is hyoscine?
A. Yes, sir.

Then, again, counsel for defendant read to the doctor from a text to which the police surgeon had referred, as follows, concerning the drug "Hyoscine (scopolamine) • • • There is possibility of narcosis [sleep] • • • the blunting of memory for recent events is a unique characteristic of the drug. • • • Habitual use, • • • may lead to mental deterioration and disorientation.

"The average adult does of hyoscine is 1/200 to 1/100 grain • • • ." (R. D1176.)

Testifying on behalf of petitioner, both during the preliminary hearing and upon the trial, was Dr. Charles D.

Proctor, not a licensed physician, but possessing a doctorate in pharmacology and toxicology (R. B495-9). At the time of the trial, he was an assistant professor in pharmacology, chemotherapy and toxicology at Loyola University Medical School (R. C498). He has worked for the Cook county coroner's office, with and for doctors, and at the Cook County Hospital (R. C504). He testified that he is acquainted with the drugs hyoscine and phenobarbital (R. C499-C500), and acquainted with leading and recognized pharmacological and toxicological and other related medical texts on therapeutics, physiology, and so on (R. C506-7). He admitted that he has never prescribed treatment for drug addition and has never observed the effect of hyoscine on human beings, his experience being virtually alone, if not solely, upon text book materials (R. C564-6).

He considered the normal range of hyoscine drug injection between .25 and .3 milligrams, translating 1/100 grains hyoscine to .6 mgs. and 1/200 to .3 mgs. from the apothecary to the metric (R. D1090-2). He considered the administration here, that of a fraction less than .29 mgs. well within the normal range (R. D1092). He considered the ½ grain phenobarbital given hypodermically a very low sedative dose, and further considered ¼ grains very low (R. D1093). The normal dose of phenobarbital for sedative effect he placed at 45 mgs.—60 mgs., and 60-90 mgs. for hypnotic or sleep-producing effects, whether administered orally or hypodermically, taking ½ grains of phenobarbital to equal 30 mgs. (R. D1090-1).

Hyoscine, in his opinion, exaggerates three symptoms of the narcotic addict's withdrawal stage—restlessness, prostration and excitation. The disorientation of the addict would be increased, affecting consciousness and memory within a wide range, from zero to all (R. C506-7, C575, D1087, D1094). Within this wide range, it accordingly produces no or severe amnesia or memory loss as to details

and events occurring during the period of the effects of hyoscine (R. C506-7, C537-8, C552-3, C580). There would also be effected an impairment of the person's consciousness, ability to reason and vision (R. C537-40, C542-3, D1087, D1089, D1118-22). In its possible effect on the central nervous system, as a depressant, hyoscine could effect results ranging from absolute sleep, preceded by apathy and drowsiness, on the one hand, to complete disorientation and excitation and prostration and restlessness, on the other (R. C536, D1118-22). The duration of amnesia would be the same for an addict as for a normal person, however (R. D1094).

Phenobarbital, another depressant, would add to and exaggerate the depressive effect of the hyoscine (R. 537), and, indirectly, affects further the subject's consciousness (R. D1089).

The effects of hyoscine on the subject's vision are described in terms of paralysis of the nerves, enervated sphincter muscles of the iris and of the ciliary muscle in eye lens, producing pupil dilations, cycloplegia, or loss of the ability to accommodate vision, so that the subject sees better objects at a distance than close-up (R. C537-8, 568). This impairment of vision ordinarily should last 4-6 hours (R. C542), and all of the effects from hyoscine relating to amnesia, and so on, should last from 5-8 hours (R. C538-40, C533-4, D1089, D1124).

Concerning the hypothetical case posed, and based on an injection of hyoscine of .3 mgs., a slight fraction more than the .289 mgs., or 1/230 grains, used, under all of the circumstances used, Dr. Proctor's expert opinion was that the total drug injection and treatment resulted in impairment of the hypothetical person's ability to reason, vision; it increased disorientation and restlessness and anxiety and excitation and prostration; and he suffered memory loss or amnesia and partial consciousness (R. C506-7,

D1119-21, D1125). However, he could not really state to what extent these symptoms or results operated here. He further based much of his testimony on the premise that the drug injection here operated at the first stage of the narcotics withdrawal symptoms or syndrome, which he estimated usually manifests itself 10-12 hours following the last narcotics injection (R. C535-6, C581).

During the course of his direct testimony, petitioner's counsel asked his own witness the following question (R. C541): "Mr. Branion: Q. 'Doctor, is hyoscine a drug that is given to pregnant women who are about to have a baby, to induce twilight sleep?'" and the expert answered, "Yes," which was later stricken for reasons not here pertinent.

F.

SUMMARY OF ARGUMENT.

Prior to empanelling the jury, the defendant claimed that the written confession in the possession of the People was drug induced, and, therefore, involuntary (R. B85). Historically, in Illinois, involuntary confessions cannot be admitted into evidence. *People* v. *Vinci*, 295 Ill. 419, 425. The use of such confessions fatally infects a trial as a denial of due process under state and federal constitutional standards. *People* v. *Miller*, 13 Ill. 2d 84, 91, *cert.* den. 28 U. S. L. W. 3377; *People* v. *Townsend*, 11 Ill. 2d 30, 38; *Spano* v. *New York*, 360 U. S. 315; *Leyra* v. *Denno*, 347 U. S. 556.

Procedurally in Illinois, the character of a confession "is a preliminary question which must be decided by the trial court from evidence heard outside the presence of the jury * * *" (13 Ill. 2d at 96). The inquiry is not confined to evidence of threats or promises, "but whether there has been any threat or promise of such a nature that a prisoner would be likely to tell an untruth from fear or threat or hope of profit from the promise" (*id.*).

That preliminary hearing was held in this case outside the presence of the jury, on the defendant's motion to suppress the confession (R. B91 to C597). This included testimony of the defendant and of a graduate pharmacist in support of the motion (R. B91-205; C495-586). The Court concluded that the confession of January 1, given to an Assistant State's Attorney, about 10:10 P.M. (R. B450) and taken down by a qualified reporter, who transcribed it in four typewritten pages (R. B444), was voluntary (R. C586) and was so when defendant signed it fourteen hours

later, on January 2, about 1:00 P.M., after it was read to him, while he followed the reading from a copy of it (R. B442-43).

That determination, however, left the weight accorded to the confession, for the jury. Thus, the testimony of the preliminary hearing had to be repeated for the jury (R. C643 to C743; C921 to D1080; D1154 to D1181). The defendant and Dr. Proctor, the pharmacist, testified for the defense before the jury (R. C801 to C920 and D1082 to D1147). It was the judge of the credibility of the witnesses, and of the weight to be given to the confession. The jury was charged with the responsibility whether to accept all or a part of the confession, and to allocate to it its measure of proof of the crime. *People* v. *Guido*, 321 Ill. 397, 420; *People* v. *Townsend*, 13 Ill. 2d 30, 45. And, to date this court has expressly left the resolution of this fact question to the superior opportunity of court and jury to observe demeanor and to detect the nuances which invite credibility or which question candor. *Thomas* v. *Arizona*, 356 U. S. 390, 402; *Watts* v. *Indiana*, 338 U. S. 49, 51-52.

In this case the overwhelming persuasion of the record supports the arrest, the interrogation, the routine medical treatment requested and obtained, the lapse of time between giving the confession and the signing of it, together with the subsequent (January 4), voluntary corroborative confession in public, to the coroner's jury.

Weighted against this valid, objective record is the uncorroborated testimony of defendant, in any detail, together with the unrelated testimony of the graduate pharmacist in the pharmacopeia of hyoscine-scopolomine, without qualified reference to the effect of this injection on this defendant, or of its effect on any person. Significant in this testimony is its parallel to standard texts, which speak of "doses", whereas here the injection was "less than a

and, was administered, non-intravenously, in a solution which included an ¼ grain of phenobarbital.

, the constitutional question is:

this injection, (a) as an independent physical fact, on the subjective record here, deprive the defend- the use of his will, to extract a confession he would ve given otherwise, regardless of its truth or falsity, y depriving him of due process?

onstitutional questions that is *not* presented here

a drug induced confession deprive the defendant right to due process? This latter question was not below by these respondents, and they, as do the e of the State of Illinois, here and now reject its stion in this Court.

e defendant accuses the physician who treated him, of ignorance, or of deliberate prevarication. His au- y for these epithets in this record is his own testi- , and the academic testimony of the graduate pharma- In addition, he has offered the post trial affidavit of sician, who professes no knowledge of the facts in ase relative to defendant's condition.

wever, that affiant fails to appraise as proper or im- er, the medical treatment given to petitioner.

r does the plea of the *lex naturalis* and papal inter- ation of it in condemning drug induced confessions, ge the nature of the issue here. The People of the e of Illinois did not use a drug induced confession, and ot expouse its use anywhere. Moreover, this Court is cord that involuntary confessions, are "offensive to vilized community's sense of fair play, decency and ce," before the late Holy Father spoke.

G.

ARGUMENT.

I.

The Record of the Trial of the Defendant in the State Court on His Indictment Proves That He Was Accorded Full Due Process, and, This Objective Fact Cannot Be Dissipated by the Petitioner's Procedural Maneuvers Subsequent to Trial.

The defendant has chosen to base his argument on the record as rewritten by him in his petition in the court below, and in his Application in this Court (p. 3). The device used is: (a) quotation marks; (b) three dots; (c) the quotation: admit the factual allegations of the petition well pleaded; (d) three dots; and, (e) quotation marks. The device is homemade. Defendant constructed it wholly from the respondents' answer to the rule to show cause why a writ of *habeas corpus* should not issue. In pertinent part, that pleading reads, as follows:

> "Respondents admit the factual allegations of the petition well pleaded, but deny that Petitioner is held in custody by respondents in violation of the constitution or laws of the United States, but aver the fact to be that Petitioner is in the lawful custody of Respondents by virtue of a valid judgment of conviction entered on April 7, 1955, as further alleged more particularly in the petition." (Par. 1, R. A28.)

Thus, the defendant must, of necessity, in this Court ignore the denial of the respondents that the trial of the defendant violated due process in the federal constitution sense. By ignoring the denial defendant may then use a rewritten record, in large measure *de hors* his trial record.

But, due process is an objective fact and not a procedurally maneuvered advantage.

The measure of the validity of defendant's conviction for the crime charged lies in the record of his trial. The measure of the validity of defendant's conviction for the crime charged, within the jurisdictional inquiry of this Court, is whether a written confession introduced into the trial in the State Court was drug-induced and, therefore, involuntary. If so, the defendant was denied due process. *People* v. *Townsend*, 11 Ill. 2d 30, 38; *Spano* v. *New York*, 360 U. S. 315; *Leyra* v. *Denno*, 347 U. S. 556.

The record of defendant's trial must, therefore, to support his conviction, show that he did not give an involuntary confession, which fatally infected his trial. The respondents respectfully submit to this Court that the trial record clearly negatives this impediment by proving the voluntary character of his confession.

The record facts which support this (and the defendant's) conviction are:

The defendant testified that he had injected himself with narcotics by means of a hypodermic needle at midnight, December 31-January 1, 1953-54 (R. B93, C810). He said, he was arrested about an hour and forty-five minutes later (R. B93). The records of the local police station show that he was received at 2:30 A. M. (R. B252). At that time the receiving officer made out an arrest slip from information furnished by defendant, who was then neatly dressed and who spoke very clearly (R. B253). This took between five and ten minutes (*id.*).

The arresting officers (defendant says there were four: Cagney and Fitzgerald, two of them) (R. B94), then took him to the interrogation room. The interrogation lasted, according to defendant from "ten minutes to 2:00, * * *, till about 4:00 or 5:00 that morning" (R. B97). It lasted

according to the officers "between thirty and thirty-five minutes," (R. B254) "from 2:45 to 3:15 A. M." (R. B281) "about half an hour" (R. B333) and "about twenty-five or thirty minutes" (R. C648).

He was placed in the women's cell, by himself, when he was transferred to another station. Without dispute he remained there, undisturbed, until 8:30 P. M., January 1, 1954 (R. B99).

He was then taken back to the original police station by two squadrol policemen at "about 8:25, 8:30" (R. B271). He was one of four men to participate in a show up (R. B102). He was not interrogated "before 9:00 o'clock that night" (R. B99). The showup was held "a few minutes" after 8:15 P. M. (R. B292); between 8:30 and 8:45 P. M. (R. B346, B347, B349), fifteen or twenty minutes after 8:25 or 8:30 (R. B421 and B423), and; fifteen minutes after 8:30 (R. B477, B478).

Immediately after the show up, while the four participants were still together the defendant and another engaged in a brawl (R. B355, B426-28; C704-05 and C826-27). The defendant was not injured (R. B357).

"Shortly before 9.00 o'clock, 9:00 P. M." (R. C648), the defendant in the presence of the four arresting officers he admitted striking and robbing the deceased, for which he was here convicted (R. C649). It was during this period that he complained of pains in his stomach, and the doctor was called (R. B358-59).

The Assistant State's Attorney arrived between 9:15 and 9:30 P. M. (R. B446). The doctor had by this time been summoned by the police (R. B447) and the Assistant State's Attorney did not question the defendant but waited for the doctor to arrive (R. B449). The Assistant State's Attorney did not see the doctor at any time during his visit to the police station.

According to the Assistant State's Attorney, the doctor arrived and treated the defendant between 9:35 and ten minutes after 10 (R. B449). When the Assistant saw the defendant about ten minutes after 10, he asked him how he felt and the defendant said "he felt much better" (R. B450). The assistant did not of course have any knowledge of the treatment given the defendant by the doctor (R. B451-452).

The defendant, in his confession, stated that he had at 6 P. M. on December 18, 1953 (R. C740), hit a man on the head with a house brick in the passageway between two buildings and that he took a wallet from the pocket of the man and threw it in the hallway near an alley on 37th Street (R. C742). There was no information given to the police prior to this statement that there was a wallet taken and that it was thrown in the hallway near an alley on 37th Street. This part of the confession is corroborated by the testimony of the boy who found the wallet in the hallway at 117 East 37th Place on the 19th of December, 1953 (R. C631). And, is further corroborated by the testimony of the wife of the decedent that she saw the wallet which belonged to her deceased husband on December 19, 1953, when it was brought to her home (R. C621).

The defendant was taken to the State's Attorney's Office January 2, about 1 o'clock (R. B307) where he met the Assistant State's Attorney who had taken the statement the night before (R. B441). The statement, which the defendant had given the night before, was then read to him (R. B442). After it had been read to him "he signed each and every page of it and he put his initials up on top with reference to the case it involved" (R. B443). The Assistant then identified the signature, "Charles Townsend" (R. B444).

Subsequently, on January 4, 1954, he testified at the cor-

ouer's inquest, at an open hearing at which his sister was present. Under oath, after being advised of his constitutional right against self-incrimination, he again confessed to the Boone murder (R. B143-8, B178-81, B184, B316-7, B380-1, B383-5, B433-5, B445, B488, C692, C905).

A.

The defendant argues that the district court erred in not holding a full hearing, independent of the state court trial record, on the voluntary character of the confession. Contrary to his allegation the voluntary character of the confession was fully tried in the State Court. Moreover, an independent hearing was not necessary in the district court in the absence of a vital flaw or unusual circumstances which would warrant a hearing *de novo*.

This latter proposition is the gravamen of the decision in *Brown* v. *Allen*, 344 U. S. 443, 463-65, 506. In the concurring opinion Mr. Justice Reed said in this connection:

> "* * * Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice. *Cf.* 28 U. S. C. sec. 2244. * * * As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. See *White* v. *Ragen*, 324 U. S. 760, 764."

See also *Thomas* v. *Arizona*, 356 U. S. 390, where Mr. Justice Clark, writing for a majority of the court, said (403):

> "Petitioner has an alternative prayer that his case be remanded to the District Court for a plenary hearing on the issue of coercion. There is no merit, however, to his contention that the District Court erred in denying the writ on the basis of the record without a full hearing. The granting of a hearing is within the discretion of the District Court, *Brown* v. *Allen*, 344 U. S. 443, 463-465 (1953), and no abuse of that discretion appears here."

Accord: *United States ex rel. Gaeron* v. *Ragen*, 7 Cir. 1954, 211 F. 2d 902, 904; *Bailey* v. *Smyth*, 4 Cir. 1955, 220 F. 2d 954, 955-6, cert. den. 350 U. S. 915; *United States ex rel. Goodchild, Jr.* v. *Burke*, 7 Cir. 1957, 245 F. 2d 88, 91, cert. den. 355 U. S. 915; *United States ex rel. Wade* v. *Jackson*, 2 Cir. 1958, 256 F. 2d 7, 9; cert. den. 357 U. S. 908.

Citing *Brown* v. *Allen*, 344 U. S. 443, 463-5, 506, and *Rogers* v. *Richmond*, 357 U. S. 220, the Supreme Court of the United States in *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276 (1959) said (277):

> "The state responded to petitioner's application and urged dismissal. The District Court, on a record limited to the aforementioned documents [*i.e.*, the petition, with 'various documents' appended, 'including an opinion of the Supreme Court of Illinois affirming his conviction and simultaneously affirming the denial to him of post-conviction remedies'] augmented by a 'report prepared by an *amicus curiae* appointed by it, dismissed the application without a hearing. * * *'
>
> "It appears from the record before us that the District Court dismissed petitioner's application without making any examination of the record of proceedings in the state courts, and instead simply relied on the facts and conclusions stated in the opinion of the Supreme Court of Illinois. We think the District Court erred in dismissing this petition without first satisfy-

ing itself, by an appropriate examination of the state court record, that this was a proper case for the dismissal of petitioner's application without a hearing, * * *."

This Court in the *Jennings* case, it should perhaps be noted, first observed that "[h]is petition contained allegations, primarily concerning the introduction into evidence at his trial of a confession coerced by physical mistreatment by police officers, which if true would entitle him to relief. * * *" (*ibid.* 276.) This implicitly reinforces and grants currency to the statements of the court, and of the concurring opinion of Mr. Justice Frankfurter, in *Brown* v. *Allen*, that some applications upon their face may be dismissed, without more, where if taken as true they show no violation of a substantial federal right. (344 U. S. 463, 506). And see also *United States ex rel. Rogers* v. *Richmond*, 2 Cir., 252 F. 2d 807, 809.

Respondents have never contended that the petition on its face, without more deserves dismissal; rather, they have argued the point only within the context of the findings of the Supreme Court of Illinois, by its reported opinion and its post-conviction memorandum, underscored only the proposition that the synonymous identity of hyoscine and scopolamine were unknown to petitioner, his counsel and the trial judge upon the preliminary hearing of the admissibility of petitioner's confessions.

Besides buttressing our theory, the *Richmond* case mediately cited above is further noteworthy for several reasons. The state appealed to the court of appeals from an order of the district court vacating petitioner's sentence. It appeared that the district judge conducted a hearing *de novo* and, at the same time, had before him only a portion of the record of petitioner's state court proceedings. Even this incomplete record, presented to him by the state upon motion, he refused to entertain or consider. In hold-

ing that the district judge's failure to call for the complete state court record, or for so much thereof as related to the question of the admissibility of the confessions, constituted an abuse of discretion and required reversal and remandment for that purpose (252 F. 2d 810-11), the court made the following additional statements and observations (809):

> But for the case of *Cranor* v. *Gonzales*, 9 Cir., 226 F. 2d 83, certiorari denied 350 U. S. 935, • • • which we shall presently show to be distinguishable, the instant case is the first *habeas corpus* proceeding since the leading case of *Brown* v. *Allen* • • • in which the District Court held a hearing *de novo* and the propriety of his doing so was challenged on appeal. • • •

The court went on to note that nothing in the incomplete record of state court proceedings before it "discloses such a 'vital flaw' in the State court proceedings or any such 'unusual circumstances,' as those terms are used in *Brown* v. *Allen*, as would warrant the federal court in holding a hearing *de novo* on the issue of the admissibility of the confessions. • • •" 252 F. 2d 810-11.

The court then continued (811):

> We conclude therefore, that on remand the judge below should take such steps as will assure him that he has in evidence not only the findings of the trial court as to the admissibility of the confessions but also the transcript of the preliminary hearing on which the trial findings were based. Unless the judge below shall find in the record thus before him material which he deems to constitute "vital flaws" and "unusual circumstances" within the meaning of *Brown* v. *Allen*, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court. *Brown* v. *Allen*, 344 U. S. at pages 507-508, • • •.

This Court, in denying *certiorari*, said: "• • • We read

the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen*, 344 U. S. 443, 506, *et seq.*" *Rogers* v. *Richmond*, *Warden*, 357 U. S. 220 (1958).

Respondents submit that the District Court, upon the mandate of this Court, proceeded to determine the constitutional issue with reference, first, to the records of the state court proceedings involving the defendant here and then only, if it deemed it advisable or necessary, take testimony. The state court records neither were before the district court initially nor before this Court on *certiorari* in this proceeding. Accordingly, this could not reasonably have intended to compel the district court to proceed—without more and where it has never viewed the record of state proceedings—to a full hearing without an opportunity given that court to exercise intelligently its discretionary power to deny or order a full hearing. Nor could this Court have acted to substitute its determination for that of the district court without at the same time acting upon the complete record of state court proceedings, not before it. This Court decided only that the petition was one that could not validly be dismissed by any court without prior reference to and an independent determination by it of the law applicable and facts undisputed upon the complete records of state court proceedings affecting the petitioner and his constitutional claim. Respondents having filed the records in this cause, the district court made the determination. That determination, respondents further submit, reasonably concluded in the court's denial of defendant's prayer for a full hearing and dismissal of his petition.

B.

In support of the allegations of his petition defendant has attached thereto as Exhibit "A" the affidavit of Dr. Nathaniel O. Calloway of Chicago, "an experienced expert in the field of internal medicine" (R. A45). After setting forth his qualifications, this affiant recites that he "has obtained special knowledge of the human physiological and psychological effects of certain drugs," and "has made a study of the effect of certain drugs upon persons who are addicted to narcotics." (*id.*) Further, he claims "special knowledge of the pharmacological characteristics of a certain drug known as hyoscine, or commonly known as scopolamine, or 'the truth serum.'" Again, he avers that from specifically enumerated and authoritatively recognized pharmacological texts he "has obtained personal [*sic*] knowledge of the fact that the drug hyoscine is identical with and the same drug as scopolamine," that they "are different names for the same drug," and concludes: "From professional experience, Affiant is of the view that without regard to the purpose for which either * * * is used, the physiological and psychological effect is the same, that is, the production of a state of mind that renders the subject injected with [them] susceptible to interrogation that produces confessions and incriminatory admissions." (*id.*) The affidavit thus is general in form without particularization respecting the circumstances at issue as to either the quantity required to produce the alleged effects, or as to the manner or mode of its assimilation by the particular petitioner, whether orally, intravenously or intramuscularly, or physical locus if injected, or otherwise.

The good doctor neglects to allude to the use of hyoscine or scopolamine as either proper or improper medical administration or treatment in cases of acute narcotics with-

drawal under the circumstances in question, as on the other hand defendant has asserted constitutes an improper use, and has avoided reference even to the question whether if considered improper or not recommended today by the weight of medical opinion, it was held proper in quondam times and is not seriously objectionable according to current consensus. For the sake of argument, however, let us assume its propriety when administered. Still all of the problems that arise in this case are not resolved satisfactorily if in fact, as Dr. Calloway avers, the drug is productive of a mental state conducive to the solicitation and elicitation of confessions without regard to the purpose for which used. Initial inquiry, accordingly, would appear to be directed toward the questions, What was petitioner's mental state following administration of hyoscine under the circumstances in question? and, Was the confession made by petitioner while in that mental state a product of his mental freedom?

No conviction of a defendant by a state court upon the basis of a coerced or involuntary confession, not the result of the defendant's exercise of free will, can withstand or survive challenge under the Fourteenth Amendment of our federal Constitution. It is "constitutionally obnoxious" not alone because of [the confession's] unreliability, Frankfurter, *J.*, in *Rochin* v. *California*, 342 U. S. 165, 173 (1952), it is offensive to a civilized community's sense of fair play, decency, and of justice, *ibid.*, and *Lyons* v. *Oklahoma*, 322 U. S. 596, 605 (1944). The accusatorial system, as opposed to the inquisitorial even with judicial safeguards, is basic to liberties and rights safeguarded by the federal due process clause. Frankfurter, *J.*, in *Watts* v. *Indiana*, 338 U. S. 49, 54, 55.

Federal *habeas corpus* is limited in scope by the sole inquiry whether any of petitioner's federal constitutional rights have been violated. (*United States ex rel. Sieg* v.

Ragen, 7 Cir. 1957, 247 F. 2d 638, 639, *cert.* den. 355 U. S. 900.) The federal courts and state courts have the same responsibilities to protect persons from violations of their federal constitutional rights. (*Brown* v. *Allen*, 344 U. S. 443, 465 (1953); *United States ex rel. Gaweron* v. *Ragen*, 7 Cir. 1954, 211 F. 2d 902, 904.) It is considered policy that the jurisdiction of a federal court to interfere with the proceedings of state governmental bodies charged with the prosecution and punishment of offenders against state laws is an exceedingly delicate one to be exercised with the greatest of care and nicest sense of propriety. (*United States ex rel. Sieg* v. *Ragen*, 7 Cir. 1957, 247 F. 2d 638, 639, *cert.* den. 355 U. S. 900.) This does not, however, on the undisputed facts in the record of the state court proceedings, detract from the powers and duties of a federal court to make its own independent determination whether there has been a violation of the due process clause by the introduction of an involuntary confession. *Malinski* v. *New York*, 324 U. S. 401, 404.

A district court is justified in dismissing a petition without a hearing if upon his examination of the state court record it is persuaded that the state courts have given fair consideration to the federal constitutional questions presented. (*Bailey* v. *Smyth*, 4 Cir. 1955, 220 F. 2d 954, 955-6, *cert.* den. 350 U. S. 915; *United States ex rel. Goodchild, Jr.* v. *Burke*, 7 Cir. 1957, 245 F. 2d 88, 91, *cert.* den. 355 U. S. 915.) Federal *habeas corpus* ought not to be accorded the status of an appeal, where state appellate processes have been exhausted and petitioner, now with different counsel, seeks to relitigate disputed questions of fact presented to and determined against him by the state courts. (Frankfurter, *J.*, in *Brown* v. *Allen*, 344 U. S. 443, 503 (1953); *Palakiko* v. *Harper*, 9 Cir. 1953, 209 F. 2d 75, 80-2, *cert.* den. 347 U. S. 956.) It is only where the records of the state court proceedings disclose unusual circum-

stances or a vital flaw—as where, for example, there is pointed up a denial of a federally safeguarded right upon uncontroverted and undisputed facts in the state court record, *Wiggins* v. *Ragen*, 7 Cir. 1956, 238 F. 2d 309, 312, 313, 314, and *United States ex rel. Wade* v. *Jackson*, 2 Cir. 1958, 256 F. 2d 7, 9, *cert.* den. 357 U. S. 908—that the district court should entertain a full hearing and, if the denial remains clear, grant petitioner's prayers.

Aptly summarizing some of the foregoing principles, rules and considerations is the statement of this court in *Thomas* v. *Arizona*, 356 U. S. 390, 402 (1958):

> Whatever the merits of this dispute [*i.e.*, whether a state law enforcement official in fact did or did not make threatening statements to petitioner to induce a confession], our inquiry clearly is limited to a study of the *undisputed* portions of the record. "[T]here has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved [against petitioner] by the State's adjudication." *Watts* v. *Indiana*, 338 U. S. 49, 51-52 (1949). Time and again we have refused to consider disputed facts when determining the issue of coercion. See *Gallegos* v. *Nebraska*, 342 U. S. 55, 60-61 (1951); *Haley* v. *Ohio*, 332 U. S. 596, 597-598 (1948); *Ward* v. *Texas*, 316 U. S. 547 (1942). The rationale behind such exclusion, of course, lies in the superior opportunity of trial court and jury to observe the witnesses and weigh the fleeting intangibles which may indicate truth or falsehood. We abide by the wisdom of that reasoning.

See also: *Brown* v. *Allen*, 344 U. S. 443, 458 (1953); *Leyra* v. *Denno*, 347 U. S. 556, 559-60 (1954).

C.

Arguendo, however, and assuming that petitioner had not his full capacities and mental freedom when on Friday, between 11:15-11:30 p. m., January 1, he gave his stenographically recorded oral confession, the record discloses a disputed fact question whether he had previously orally confessed to the arresting police officers, about 9:00 p. m. (R. B649), and the facts that on Saturday afternoon, January 2, sometime between 1:30-3:00 p. m., he signed a transcription of the oral confessional stenographically recorded the previous night, about 14 hours earlier (R. B419), and much later, Monday, January 4, again confessed at the coroner's inquest (R. B472).

The record evidence discloses, and the Supreme Court of Illinois stated, that by the testimony of petitioner's own expert witness the effects of the drugs in question could not have lasted beyond 5-8 hours (R. C538-40). (See, also, 11 Ill. 2d 37, 41.) So at best, viewing the facts most favorably to petitioner, it was disputed whether as a result of his mental confusion, police threats and pressure, and so on, he voluntarily signed his confession and later confessed at the coroner's inquest.

The jury was instructed by the court that the alleged oral confession given about 9:00 p. m. Friday, January 1, because verbally given and not otherwise recorded except by memory, should be considered cautiously, etc. (R. D1274-5). Otherwise, the jury was instructed with reference to the defendant's state of mind as affected in any way by the administration of drugs when he gave his confession again later that Friday evening that they might disregard the confession (*id.*, 1271). Similarly, with respect to threats, promises or physical brutality or duress or other coercion, they were instructed with regard to that confession, generally (*id.*, 1271), and specifically (*id.*, 1272);

as with regard to all confessions in the case and the weight to be given them (*id.*, 1272-3, 1281), inclusive of that given at the coroner's inquest (*id.*, 1276).

Now, to emphasize a point already indicated, the trial judge did not instruct the jury to return a verdict of not guilty if they found the stenographically recorded confession of Friday night to have been involuntarily given. It merely instructed the jury to disregard it in that event, on the theory apparently that if disregarded there would still be sufficient competent evidence before the jury which, if believed, would sustain a guilty verdict.

Next, and of equal importance is the fact that at no time, either during the trial, on writ of error in the Supreme Court of Illinois, in his state post-conviction petition or in the instant *habeas corpus* proceeding, has defendant ever contended that he signed the confession at the state's attorney's office, after it was read to him in full, and confessed again at the coroner's inquest, while still under the influence of the drugs or because he had previously been induced to make a so-called drug-induced confession. In short, he has never contended that all confessions in evidence in this case were parts of "one continuous process" within the meaning and facts disclosed in *Leyra v. Denno*, 347 U. S. 556, 561 (1954). See also *Burwell v. Teets*, 9 Cir. 1957, 245 F. 2d 154, 162-3, and *Lyons v. Oklahoma*, 322 U. S. 596, 597, 604-5 (1944).

II.

Consideration of the Defendant's Constitutional Claims:

A. The defendant argues that the police surgeon either was ignorant or a prevaricator stating that he did not give the defendant truth serum (App. p. 9). The challenge to the doctor's lack of knowledge is basically immaterial, since he did, in the undisputed facts in this case, give the

defendant as accepted treatment for narcotics withdrawal, which he had administered to more than 3500 patients over a period of some 14 years. The doctor was a general practitioner, and whether he knew that this drug was capable of its so-called truth producing propensities, it is undisputed in the record that he had ever had occasion to recognize it as such to use it as such, or that he had in any way recognized that the 'ministrative dose given this defendant would in any way react along those lines. Nor, could the doctor properly be termed a liar on the basis of the record here, since his unqualified testimony on cross-examination that he did not give the defendant "any truth serum or anything—that you consider that" (R. B228). Since the question is directed to the doctor's appraisal of what he administered to the defendant, under the conditions which it was administered, for the purpose for which it was considered, the record is undisputed that the doctor was telling the truth.

B. In his application here (p. 9) the defendant has cited catch phrases or scare words from pharmaceutical documents. The scare words used are "delirium" and "poisonous". Since the cautionary excerpt quoted refers to exceptions rather than rules, the testimony of the effect of the treatment given the defendant was one of credibility. There is nothing in this record to indicate that the defendant was poisoned. Thus, the fact that he was given an injection of a drug in a quantity of a solution, and in conjunction with another drug, which did not poison him, the suggestion is no more pertinent here than would the allegation that an overdose of aspirin would be fatally poisonous to a child.

Reference to the *Dispensatory of the United States* again shows that in doses large enough, or in people susceptible to it, the drug undiluted has a toxic and intoxicating effect upon given individuals. This again reduces the defend-

ant's case to the record before the jury in the trial on the indictment, and the evidence supporting the jury's weighing the credibility of witnesses to support its verdict.

With regard to defendant's citation of *Modern Drug Encyclopedia and Therapeutic Index* at page 437, hyoscine-scopolamine is listed as a medication for drug and alcohol withdrawal.

From the foregoing, it is readily apparent that the defendant does not have either testimony or authoritative scientific support for his charge that the treatment given him produced a mental state whereby he was forced to give an involuntary confession of a crime.

C. (1) Modern Drug Encyclopedia and Therapeutic Index, 7th Ed., Drug Pub., Inc., 1958, is edited by Dr. E. P. Jordan of the University of Virginia Medical School. The petitioner "relies upon" the prior edition of this index (App. p. 9). In the foreword to the latest edition (*id.*, iii) the editor says: "The purpose and contents • • • are well known."—In order to determine both, reference is made to the first edition (1934, Am. Journal of Surgery, Inc., New York). "This treatise is designed to meet the demand of the progressive physician for information concerning the most modern therapeutic agencies placed at his command • • •." (*id.* v.) Since Dr. Mansfield, the attending physician, had treated some 20,000 narcotic addicts (R. B217-18), and some 3,500 with this formula, he was undoubtedly familiar with the dosages of the Index, and the drug houses which made the pills.

The Index has identical verbatim texts for hyoscine hydrobromide (p. 555), and scopolamine hydrobromide (p. 1014). Two drug houses sell the preparation in tablets of 1/100 gr. (0.65 mg.) and in 1/200 gr. (0.32 mg.). Its recommended "Action and uses" among others is "in the withdrawal treatment of narcotic • • • addicts" (*id.*). The subcutaneous dosage "as a sedative" is "1/60 gr., or,

1/120 gr." *Again*, this petitioner was given 1/230 gr. in a sterile solution with ¼ gr. of phenobarbital (R. B214-15).

In a desperate use of the asterisk to stimulate imagination to supply that which the text cannot, the petitioner quotes from "The Dispensary of the United States of America, 25th Ed., Lippincott, Philadelphia, 1955, p. 122 • • •" (App. p. 9). The citation is in error. The article on Scopolamine hydrobromide runs from pp. 1221 to 1224. The petitioner's first excerpt is part of a sentence from p. 1222, and the second from p. 1223.

The first dissociated part sentence he quotes is preceded by one which says that scopolamine differs from atropine, "in that it is not stimulant to the medullary centers • • •; also, it frequently appears to act as a cerebral depressant and tends to promote sleep." Then follows petitioner's quote, followed by the rest of the sentence: "this effect may be observed in a patient in pain." (Compare the cautionary note pp. 555, 1014, in the Modern Drug Index and in Pharmacological Basis of Therapeutics with reference to pain.)

This sentence then follows: "A striking effect of *large doses* of scopolamine is the loss of memory for events which happened while the patient was under the influence of the drug." (Emphasis added.) *Again*, the injection given this petitioner was less than ½ a dose, 1/230 grain.

This text reports the use of this drug given "*intravenously* with pentobarbital sodium in labor." (Emphasis ours.) The dosage for active labor is 10 ml [Ed. Note 10 ml. = 10 cc's] of aqueous solution containing 250 mg (3¾ gr.) of pentobarbital sodium and 0.65 mg. (1/100 gr.) of scopolamine hydrobromide; • • •." (p. 1222.) This injection into the blood stream was to extend over a 3 minute period "until the patient becomes sleepy or incoherent."

Compare this apothecary for a woman in the throes of labor pains of 30 seconds duration at 4 minute intervals (*id.*), with the discomfort of withdrawal symptoms (R. D1017) in a man physically able to engage in a brawl an hour prior to treatment (R. B355, B426-28, C704-05, C826-27). Compare the intravenous, powerful dosage for intense labor against the subcutaneous injection into the petitioner which was approximately 1/5 the volume (2 cc's vs. 10 cc's); ½ gr. of phenobarbital vs. 3¾ gr. of pentobarbital, and, 1/230 gr. of scopolamine vs. 1/100 grain.

The Pharmacopoeia of the United States (App. p. 9) 16th Ed., October, 1960, Mack Pub. Co., Easton, Pa., for scopolamine hydrobromide, denominates the "usual dose—Subcutaneous, 0.6 mg." (p. 637.) The petitioner here was administered subcutaneously, .289 mgs., or 1/230 gr. (R. C506-07) "less than ½ dose" (R. D1092).

The Pharmacological Basis of Therapeutics, Goodman and Gilman, Macmillan, 1st Ed., 1941 (pp. 460-477) is cited by petitioner (App. p. 9). There is also a 2nd Ed., 1955, ch. 25 (pp. 541-559). The total effect of these articles is that the dosage given to this petitioner were proper medication, and safely within the amounts beyond which torpor or delirium may occur. As a matter of fact, all of these authorities belie delirium in the absence of pain.

Both these Goodman and Gilman editions carry one line, which is not suggested, intimated, implied or footnoted by any other text or index in the field. It is: "Scopolamine has also been employed to obtain criminal confessions." (1st ed., p. 472; 2nd ed., p. 554.) It is undocumented. It is at variance with its pharmacological text. It is unrelated to subject, to person and by analogy to any of the accompanying data.

It is, of course, unrelated to this petitioner. He was not by the unassailable portions of this record administered a

drug to extract a confession. Nor does he profess to such purpose. He testifies to disorientation, to torpor, to amnesia (R. B117 to B151). He claims text authority (App. p. 9) that scopolamine produces sleep "with low muttering delirium." He doesn't claim to have muttered, nor does he claim to have been poisoned or to have been delirious.

His real claim here is that he gave a confession, which for reasons subsequent, he now strives to repudiate. Whatever his basis for extricating himself from his present predicament, the least supportable claim is that the proper medication given to him at his request trapped him into a signed confession for a crime he didn't commit.

The state court trial record is to the contrary.

C. (2) The defendant cites a series of Law Review articles which he says have been uniformly critical of the reasoning of the Supreme Court of Illinois [in the Townsend decision] (pp. 10-11). An examination of these authorities does not support his argument. The Northwestern Law Review contains a student note which is prefaced by the following statement: "The unsigned and uninitialed contributions are written by students of Northwestern University School of Law. Publication does not imply agreement with the views expressed" (52 N. W. Law Rev. 665). Moreover, the note contains the following significant sentence with regard to applicability to the issue here.

> "The truth serums, however, do not consistently produce truth; instead, they yield a mixture of truth, fantasy, suggestion, and sometimes outright lies." (*id.* 670.)

In 24 Brooklyn Law Rev., 96, a non-student author distinguishes the case at bar from truth serum cases on the ground that it "illustrates the difference in the nature

of police actions when a drug is given for the purpose of providing medical relief" (*id.*, p. 108). It is basic in the case at bar that the record supporting the entire People's case is that this doctor was called for the purpose of treating the defendant, that he treated the defendant for relief of his distress, based upon a diagnosis without prior knowledge of the status of the defendant's incarceration and without informing the police or the State's Attorney of the nature of the treatment given to the defendant.

The other citations of learned documents and papal application of moral doctrines is based upon a subjective article by a graduate theologian. In *Narcointerrogation of a Criminal Suspect*, 50 Journal of Crim. Law and Criminology, 118-123, Father Sheedy writes a sympathetic article with special acknowledgement to the writer of the dissenting opinion of the Supreme Court of Illinois and with acknowledgment of the defendant's present attorney in this matter. Since Father Sheedy wrote the article begging the question of the physiological effect of the treatment upon the defendant, his conclusion is apropos of the case here to show his total subjective approach to this defendant and his problem. He concluded at page 123 as follows:

> "Once more, in conclusion, it may be held that these heavy strictures should not be made to tie in Townsend's case because the injections were made professedly to heal and soothe, not to extort a confession. However, the result followed just as precisely as if purposeful narcointerrogation had been the express aim. Therefore, *it is argued here* that Townsend was morally compelled to act as a witness against himself, and was deprived of justice and due process of law." (Emphasis added.)

CONCLUSION.

The order of the court below affirming the dismissal of the petition for a writ of *habeas corpus*, based upon an examination of the state court trial record, on the ground that no federal constitutional question resulted from the trial of the defendant is correct and the petitioner's application for a *certiorari* should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 78

CHARLES TOWNSEND,

Petitioner,

vs.

FRANK G. SAIN, Sheriff of Cook County; and JACK JOHNSON, Warden of the Cook County Jail,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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CITATIONS

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 76

CHARLES TOWNSEND,

Petitioner,

vs.

FRANK G. SAIN, Sheriff of Cook County; and JACK JOHNSON, Warden of the Cook County Jail,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

CHARLES TOWNSEND, petitioner, is under a sentence of death imposed for the alleged crime of murder in Cook County, Illinois. After exhaustion of all remedies under Illinois law, petitioner filed an application for writ of habeas corpus in the United States District Court for the Northern District of Illinois. The petition was denied; and on appeal, denial was affirmed by the Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals is reported in 276 F. 2d 324.

Jurisdiction

The judgment of the Court of Appeals was entered April 7, 1960. On July 5, 1960, by order of Mr. Justice Frankfurter, the time within which to file a petition for writ of certiorari was extended to July 13, 1960. On July 13, 1960, by order of Mr. Justice Black, the time within which to file the petition for a writ of certiorari was further extended to July 14, 1960. The petition for writ of certiorari was filed July 14, 1960 and was granted April 3, 1961. The jurisdiction of this court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the opinion of the Court of Appeals for the Seventh Circuit holding that " . . . On habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the record . . . " is in conflict with the opinion of the Court of Appeals for the Second Circuit in *Rogers* v. *Richmond*, 252 F. 2d 807.

2. Whether the Court of Appeals erred in holding that in the habeas corpus proceedings in the district court " . . . evidence was insufficient to support charge . . . " and that " . . . petitioner has burden of sustaining his charge that his constitutional rights were violated in procuring his confession . . . ," when in fact, the district court denied petitioner a hearing and opportunity to produce any evidence in support of the allegations contained in his application for a writ of habeas corpus.

3. Whether petitioner's application for a writ of habeas corpus relief under these circumstances.
answer that they admit " . . . the factual allegations of the petition well pleaded . . . " show that in the state court criminal trial petitioner was deprived of the due process of law in violation of the 14th Amendment.

4. Whether the record in this habeas corpus proceeding shows that the Illinois courts misconceived petitioner's federal constitutional rights when there was admitted in evidence against petitioner a confession taken from him while he was under the sedated influence of a narcotic drug injected into petitioner by a police physician; and whether the Court of Appeals erred in affirming denial of habeas corpus in the district court, together with respondents'

5. Whether, in view of the fact that this court has never reviewed a case involving the admissibility under the 14th Amendment of a drug-induced confession, petitioner presents to this court an occasion to pass on an important federal question which transcends the constitutional rights of petitioner here, and will affect the administration of criminal justice in the state courts of the Nation.

Statutes Involved

Chap. 38. Ill. Rev. Stat. (1953).

HOMICIDE

§ 358. Murder

Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by

which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

§ 360. Murder—Punishment

Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court.

"§ 826. Proceeding to determine whether constitutional rights were denied—Petition—Limitations

Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Act. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the state's attorney by any of the methods provided in Rule 7 of the Supreme Court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this Act shall be commenced more than five years after rendition of final judgment, or more than three years after the effective date of this act, whichever is later, unless the petitioner alleges

facts showing that the delay was not due to his culpable negligence."

Statement

(a) *Introduction*

Procedurally, this is a habeas corpus petition filed after exhaustion of state remedies.[1] Factually, this is a murder case in which Charles Townsend, a 19 year old mental defective was sentenced to death in an Illinois court. The crucial events began early New Year's Day, 1954 in a dark Chicago street.

(b) *The substantive facts*

On January 1, 1954, Charles Townsend was a 19 year old narcotic addict who had used drugs since he was 15 years of age. During the late evening hours of New Year's Eve he had taken an injection of narcotics. As shown by later examinations, Townsend had a low intelligence quotient of 63. He was classified as possessing " . . . a border line intelligence . . . "; and the diagnosis in his case " . . . was character disorder, with drug addiction . . . " (Rec. B, 92; Rec. C, 803; Rec. C, 785).[2] According to a prosecution wit-

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[1] In its opinion, the court below said " . . . both in the review of petitioner's conviction by writ of error, 11 Ill. 2d 30, 141 NE 2d 729, and in its order entered in the post-conviction proceeding, the Illinois Supreme Court considered and rejected the constitutional attacks now made by petitioner. He has exhausted in the state courts remedies afforded to him by Illinois . . . " *United States of America* ex rel *Townsend* v. *Sain*, 276 F 2d 324, 238-329.

[2] The Record in this case consists of seven separate parts. These are the six designated portions in the court below, and the certified transcript of the record in the Court of Appeals.

In the court below, petitioner designated six portions "A" to "F". "A" is the certified transcript of the record in the United States District Court for the Northern District of Illinois, De-

ness (Rec. D, 1026-1031), Charles Townsend was a " . . . near mental defective . . . ", and although " . . . moron is a classification that has been more or less dropped . . . " from psychological terminology, petitioner, " . . . would be just a little above moron, then, using old terminology . . . " (Rec. D, 1031).

A few hours before New Year's Day, 1954, a Chicago police officer had a conversation with a man named Vernon Campbell in the Second District station (Rec. C, 644). Campbell, a convicted robber then on probation, had been in police custody several days before this conversation (Rec. C, 768-769, 771). A short time later, Campbell, with four

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cember Term 1958. This portion consists of 44 pages of the Clerk's mandatory record and a Report of Proceeding consisting of 70 pages.

"B" is Volume I of the proceedings in the Criminal Court of Cook County in which petitioner was tried, convicted and sentenced to death. "B" consists of 134 pages of the Clerk's mandatory record, or what under Illinois practice is called Common Law Record, and 493 pages of the Record of Proceedings.

"C" is Volume II of the same state court proceedings, and it consists of pages 494 to 974.

"D" is Volume III of the same state court proceedings, and it consists of pages 975 to 1335.

"E" is the certified transcript of the proceedings in the Criminal Court of Cook County under the Illinois Post-Conviction Act. This consists of 64 pages of the Clerk's mandatory record and a Report of Proceedings of 29 pages.

"F" is the certified transcript of the record of the United States District Court for the Northern District of Illinois which on appeal to the court below was transmitted by the clerk to the United States Court of Appeals for the Seventh Circuit. This transcript consists of 156 pages of the Clerk's mandatory record, and a Report of Proceedings of 83 pages.

The system which is adopted here for references to the Record is as follows:

Record references are only to the Reports of Proceedings; therefore, these are made thus: (Rec. A. 10), meaning page 10 in Report of Proceedings included in "A".

police officers, went to the intersection of 35th Street and Indiana Avenue in Chicago where they saw Charles Townsend in the company of another man (Rec. C, 644-649). The officers arrested both Townsend and his companion. At approximately 2:25 AM on January 1, 1954, both men were taken to the Second District police station in the City of Chicago (Rec. C, 647-649; D, 1037-1038).

Upon arrival, Townsend was processed and later subjected to a twenty to thirty minute period of interrogation (Rec. C, 647-649). One of the officers, Cagney, questioned Townsend " . . . about a robbery and murder that happened on 38th and Michigan. . . . he talked to me about half an hour about that. I told him I didn't know anything about this robbery and murder. . . . " (Rec. B, 96). A short time later, Townsend was transported from that police station to the Nineteenth District where he arrived at approximately 5:00 AM (Rec. B, 96-97; 258-260; C, 647-649). Townsend remained at the Nineteenth District until approximately 8:30 PM that evening (Rec. B, 100-101). He was then returned to the Second District where he was immediately turned over to the four officers that arrested him early in the morning of that day (Rec. B, 101-102; C, 816-820).

A short time later, the arresting officers began questioning Townsend (Rec. B, 343-351; D, 1038-1040). A "show-up" was conducted with three other prisoners in the line-up, including Townsend (Rec. D, 1040). One of the men who viewed the show-up was an insurance man named Gus Anagnost (Rec. C, 685-687) who was at the police station to identify the man who had robbed him (Rec. C, 686; See: Respondents' Additional Answer to Petition for Habeas Corpus, page 4). Anagnost did not identify Charles Townsend; rather, as his assailant he picked out another man " . . . who was supposed to have held him up with a

brick . . . " (Rec. C, 686; D, 1041; See: Respondents' Suggestions in Opposition, pages 9 and 18; See: Respondents' Additional Answer to Petition for Habeas Corpus, page 4). Because of this identification by Anagnost, there was an altercation between Townsend and another prisoner in the show-up (Rec. B, 426-430).

An Assistant State's Attorney, Rudolph L. Janega (Rec. C, 712-717), arrived at the Second District station between 9:15 and 9:30 PM. Five minutes later (Rec. C, 719), he began questioning Townsend. Townsend " . . . said to me that he wanted a doctor. Yes, I noticed his condition at that time. He was holding his stomach and he complained. He said he wanted to talk to a doctor, to see a doctor. . . . I noticed that he was very nervous and he was bent over . . . his voice was very low. He told me there that he didn't want to talk to anybody. He wanted a doctor . . . " (Rec. C, 718-722).

One of the officers, Cagney, learned from Townsend, at the time of the arrest, that he was a narcotic addict (Rec. B, 357-359). Townsend told Officer Cagney in the presence of the Assistant State's Attorney that he had pains in his stomach (Rec. B, 356-359). Townsend said " . . . he didn't want to talk at all . . . " (Rec. B, 359-360). In the presence of Officer Cagney, Townsend, once in a while leaned over. Officer Cagney " . . . didn't count the times he bent over and grabbed his stomach. I wouldn't be able to say how many times. . . . it could have been 50 times. . . . I know he had pains in his stomach . . ." Because of the condition Townsend displayed, the Assistant State's Attorney " . . . told me to get a doctor for him . . . " (Rec. B, 360). Because Townsend complained of having chills and stomach pains (Rec. C, 829-830), Officer Cagney told Townsend that " . . . he was going to call a doctor, a friend of his, and have him come down and do something for me . . . " (Rec. C, 831).

Officer Cagney called the doctor. " . . . I had a conversation with the doctor on the telephone. Yes, he asked me what was wrong with the prisoner. I told him the man was sick and he wants a doctor . . . " (Rec. B, 358-359). A short time later, a Dr. Charles Mansfield came to the police station to administer to Townsend (Rec. C, 832-834).

Dr. Mansfield was " . . . associated with the City of Chicago as a police physician . . . . " (Rec. B, 212-213). His examination of Charles Townsend showed that " . . . he was a drug addict, suffering from withdrawal . . . " (Rec. B, 213-214). By "withdrawal" the doctor meant that "there was a reaction throughout his body and physical makeup that created an illness because he needed some drugs, narcotics . . . " (Rec. B, 214). Throughout the time that Dr. Mansfield examined Charles Townsend, Officer Cagney who had called the doctor at Townsend's request was in the room (Rec. B, 214). In fact, Officer Cagney assisted the doctor in administering to Townsend (Rec. B, 214-216). It was Officer Cagney who identified Townsend as the man he wanted the doctor to see (Rec. B, 224). In the presence of Officer Cagney, Dr. Mansfield took a glass of water which Officer Cagney obtained for him and " . . . I put a sodium chloride tablet in it, dissolved it, rinsed off my needle and syringe. Then I withdrew some normal saline solution from into my syringe and I put a couple of small tablets into the syringe with the lour removed—that is the plunger—and I dissolved these tablets. So one piece of the tablet was sodium phenobarbital, well, one-eighth grain; then a piece of the tablet was about, oh, less than one-half hyoscine. Then I dissolved these two and I prepared to inject . . . " (Rec. B, 214-215).

"The phenobarbital, I found in my experience reacts very well combined with the other, whenever you don't want to put a person to sleep, but you want to quiet them; more of a psychic effect than reality . . . " (Rec. B, 215).

"By 'psychic effect' I mean pacify; it has an effect on the mind. . . . " (Rec. B, 216).

After the drug injection, Dr. Mansfield left. Assistant State's Attorney Janega returned immediately into the room and noticed that Townsend's " . . . voice was strong. Yes, I noticed that then. . . . he was more responsive, yes. Although Townsend was " . . . not very responsive at first he was complaining at first. Yes, all he wanted was a doctor at first . . . " (Rec. D, 724-725). Townsend then " . . . told me he felt better (Rec. D, 723-727).

"About fifty minutes had elapsed between the time that Cagney had closed that door with that glass of water to the time they started to question the defendant . . . (Rec. B, 301-303). As the doctor was leaving they brought Townsend through the door into a larger room . . . " (Rec. B, 299-301). Townsend then " . . . was sitting erect when he answered the questions . . . " (Rec. B, 302).

The Assistant State's Attorney then began taking confessions from Townsend:

At 10:40 PM Townsend gave a statement " . . . regarding the assault on Gus Anagnost . . . " (See: Respondents' Additional Answer to Petition for Habeas Corpus, page 5). Gus Anagnost did not identify Charles Townsend as the man who had assaulted him. " . . . he identified a man who was supposed to have held him up with a brick. No, it wasn't the defendant that he identified . . . " (Rec. B, 1041).

At 10:45 PM Charles Townsend gave "the statement regarding the death of Johnny Stinson . . . " Charles Townsend was later indicted for the murder of Johnny Stinson; and the statement taken by the Assistant State's Attorney was admitted in evidence. The case was tried before a jury, and Townsend was " . . . adjudged not guilty and dis-

charged . . . " (Respondents' Additional Answer to Petition for Habeas Corpus, page 2).

At 11:00 PM Charles Townsend gave " . . . the statement relative to the death of Thomas Johnson . . . " Johnson's death was the subject of a Coroner's Inquest which revealed that when he was found injured on December 2, 1953, Johnson said that " . . . it was just one of those things . . . it was just a little drinking. Just an accident . . . "[3]

Townsend was later indicted for the murder of Thomas Johnson; but on April 7, 1955, at the prosecution's request, that indictment was "stricken with leave to reinstate . . . " (See: Respondents' Additional Answer to Petition for Habeas Corpus, pages 5 and 6).

At 11:15 P.M. Charles Townsend gave " . . . the statement regarding the death of Jack Boone. . . . " Eleven months later Townsend was tried for the murder of Jack Boone. On April 7, 1955, in accord with the jury's verdict, he was sentenced to death (Rec. D, 1287; 1319-1322).

During this same period of interrogation, on January 1, 1954, inquiries were made of Townsend concerning the death of a man named Willie Thompson (See: Respondents' Additional Answer to Petition for Habeas Corpus, pages 1 and 3). Townsend denied having any knowledge of Thompson's death. Inquest Minutes of the Coroner's Hearing of January 4, 1954, at page 22, contain the following colloquy.

> "The Deputy: Well, as I said, please would you let me up for a minute.
>
> Officer Cagney: Well, we can go out and get these guys. They have their patterns. Why shouldn't we be given credit for these clean-ups . . . "

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[3] Respondents have furnished the Court with copies of the Coroner's Inquest Minutes in this and in the other murder cases concerning which Charles Townsend gave statements on January 1, 1954.

Townsend " . . . could not recall the details of the assault which led to the death of Thompson . . . "; therefore, " . . . Janega did not take a statement from him. . . . " (See: Respondents' Additional Answer to Petition for Habeas Corpus, page 3).

Townsend was later indicted for the murder of Willie Thompson. On April 7, 1955, the day that Townsend was sentenced to death, the state, on its own motion, asked the court to strike the indictment with leave to reinstate (See: Respondents' Additional Answer to Petition for Habeas Corpus, pages 5 and 6).

After all of the statements had been taken at about 11:30 P.M., on January 1, 1954, Townsend was returned to a cell (Rec. B, 275). There he remained until approximately 1:00 P.M. on January 2nd, when two officers (Rec. B, 392-395) took him to the offices of the State's Attorney (Rec. B, 455-456). There, Townsend saw the Assistant State's Attorney who had taken the statements the night before (Rec. 455 C, 727-728). The statements had been transcribed into written form (Rec. C, 714-717; 733-736).

After the statements were signed, Townsend was returned to the cell in the Second District police station (Rec. B, 307-309) where he remained until Sunday, January 3rd when he complained to Officer Cagney that " . . . he didn't feel good. He said he would like to see the doctor . . . " (Rec. B, 388). Dr. Mansfield was called to administer to Townsend (Rec. B, 221); and he said, "Well, I'm going to give you something else that will help you . . . " (Rec. B, 221).

The following day, Monday, January 4, 1954, Charles Townsend was taken to a multiple inquest hearing before the Coroner of Cook County. There, he was subjected to additional interrogation concerning the deaths of Jack

Boone, Thomas L. Johnson, and Johnny Stinson (See: Respondents' Additional Answer to Petition for Habeas Corpus, pages 1 to 4). Thereafter, on the same day, Townsend was delivered to the custody of the Sheriff of Cook County and lodged in the Cook County Jail (Rec. B, 147-148).

(c) *How the federal constitutional questions were raised and preserved for review in the State Courts.*

Based on the statements taken by Assistant State's Attorney Janega on January 1, 1954, Townsend was indicted for the murder of Jack Boone, Thomas L. Johnson, Johnny Stinson, and Willie Thompson. In addition, he was indicted for the robbery of Gus Anagnost and of a man named Joseph Martin (See: Respondents' Additional Answer to Petition for Habeas Corpus, pages 5 and 6).

On March 24, 1954, Townsend was tried for the murder of Johnny Stinson. His motion to suppress the confession was overruled; and the statement taken by the Assistant State's Attorney on January 1, 1954, was admitted in evidence before a jury. Townsend was found not guilty and discharged (See: Respondents' Additional Answer to Petition for Habeas Corpus, page 2).

On February 7, 1955, Townsend was brought to trial for the murder of Jack Boone (Rec. B, 88). A motion to suppress the statement of January 1, 1954 was made; and evidence on the motion was heard by the trial court (Rec. B, 91-494; C, 495-587). The four arresting officers testified (Rec. B, 280, 332, 416, 465). In addition, the prosecution called nine other police officers, all of whom had some part in Townsend's incarceration (Rec. B, 251, 258, 262, 265, 268, 270, 272, 274, 392). Two employees of the police department also testified (Rec. B, 401, 410). The Assistant State's Attorney and the official court reporter were called (Rec. B, 438, 457). Dr. Clarence Mansfield who gave the drug in-

jection appeared for the prosecution (Rec. B, 209). In support to suppress Charles Townsend testified (Rec. B, 91). In his testimony, Dr. Mansfield described the drug he used on January 1, 1954 as "hyoscine" (Rec. B, 215). The motion to suppress the statement was overruled by the trial court (Rec. C, 586-587). The statement was admitted in evidence and read to the jury (Rec. C, 739-743). Townsend was convicted; and on April 7, 1955 death sentence was entered on the verdict of the jury (Rec. B, 1319).

Pursuant to Illinois law Townsend's conviction was reviewed by the Supreme Court of Illinois. In an opinion with two justices dissenting, the court affirmed. The court specifically passed on Townsend's federal constitutional claims arising out of his contention that the statement of January 1, 1954 was involuntary. *People* v. *Townsend*, 11 Ill. 2d 30, 141 NE 2d 129. Petition for certiorari was denied by this Court. *Townsend* v. *Illinois*, 355 US 850, 78 S.Ct. 76, Rehearing denied, 355 US 886, 78 S.Ct. 152.

Thereafter, pursuant to Illinois law, Townsend filed a petition for post-conviction review of his conviction alleging, in substance, that during the review in the original conviction, his court-appointed appellate counsel learned that the drug which had been described as "hyoscine" by Dr. Mansfield was in fact "scopolamine", a drug commonly known as "the truth serum". Townsend alleged that description of the drug only as "hyoscine" deprived the trial court and the trial jury of vital information concerning the true nature of the drug used by Dr. Mansfield (Rec. E, 1-764); and thus the trial court was misled into finding that the confession was voluntary. The trial court dismissed the petition; and on writ of error, the Supreme Court of Illinois entered an order affirming denial of post-conviction relief. This Court denied certiorari, *Townsend* v. *Illinois*, 358 US 887, 79 S.Ct. 128.

(b) *How federal jurisdiction was invoked.*

Thereafter, Townsend filed in the District Court, a petition for writ of habeas corpus, pursuant to 28 USCA 2241, *et seq.* In this petition, Townsend alleged exhaustion of state remedies and described the use of the drug "hyoscine", also known as "scopolamine" which Dr. Mansfield injected into him just prior to the statement which was used in the state court trial. Townsend alleged that admission in evidence of the statement deprived him of due process in violation of the 14th Amendment. The United States Court of Appeals dismissed the appeal. *United States ex rel Townsend* v. *Sain*, 265 F 2d 660. On petition for writ of certiorari, this Court vacated the Court of Appeals judgment. *Townsend* v. *Sain*, 359 US 64, 79 S.Ct. 655.

On remand to the District Court, respondents submitted to the District Judge Volumes I, II, and III of the state court proceedings in the Criminal Court of Cook County. The District Judge ordered briefs filed by the parties, and took the cause on advisement of the petition habeas corpus, respondents' answer and the state court records. The District Judge proceeded on the theory that he could read the state court records (Rec. F, 135-137), and either dismiss the petition or grant Townsend an opportunity to prove the allegations of his application for habeas corpus. The District Judge dismissed the petition and said ". . . that justice would not be served by ordering a full hearing or by awarding any or all relief sought by the Petitioner . . ." (Rec. F, 136). Townsend appealed to the United States Court of Appeals for the Seventh Circuit. That court affirmed; *United States of America ex rel Townsend* v. *Sain* et al., 276 F 2d 324.

A Summary of the Argument

1. Petitioner rests his case on undisputed facts only. Relying on *Thomas* v. *State of Arizona*, petitioner, in effect, submits a legal issue which discloses that the federal courts below, and certainly the state courts, misconceived petitioner's federal constitutional question.

In sum, petitioner claims that a drug injection was the factor which broke down his will and brought about confessions which he had refused to give. With regard to the pharmacological characteristics of hyoscine or scopolamine, drugs which in police science are known as "the truth serum", petitioner's description of their effects on him is supported by such authorities as Goodman and Gilman, *The Pharmacological Basis of Therapeutics;* Gathercoal and Wirth, *Pharmacognosy; British Pharmacopeia*, and numerous authoritative sources. Hyoscine and scopolamine have the physiological effects which petitioner in his layman's crude way described.

As a consequence, the case made here by petitioner is one showing an involuntary confession which resulted from a drug injection given petitioner by a police doctor while petitioner was in police custody. *Leyra* v. *Denno; Fikes* v. *Alabama; Payne* v. *Arkansas;* and *Blackburn* v. *Alabama* are cases representing applicable constitutional doctrines. This court will make its own determination of the delicate constitutional questions, even though it will not resolve conflict in the evidence. *Thomas* v. *State of Arizona*. This latter function is necessarily imposed on this court by the fact that no less than eight plain errors appear in the opinion of the court below.

For these reasons there must be a reversal of the judgment below with directions that petitioner be granted habeas corpus relief.

2. This Court has never held, nor did it pronounce in *Thomas* v. *State of Arizona*, that " . . . on habeas corpus, the district court's inquiry is limited to a study of the *undisputed* portions of the *record*." This Court has established the procedural doctrine, *Haley* v. *Ohio*, *Watts* v. *State of Indiana*, that when a state court record is reviewed by this court on grant of certiorari, the constitutional issue will be decided on the undisputed portions of the record. *Thomas* v. *State of Arizona*. It is apparent that the court below failed to distinguish between the functions of this court and the duties of district courts as defined and instructively explained in *Brown* v. *Allen* and *Daniels* v. *Allen*.

Further, as if to cap the errors in the judgment below, the Court of Appeals found that petitioner had failed to carry the burden of proof when in fact the district court denied petitioner the opportunity to introduce evidence. This is not only unfair, it is prejudicial error. Therefore, the judgment below cannot stand.

ARGUMENT

From the Undisputed Facts in the State Court Records, and From Allegations of Petitioner's Application for Writ of Habeas Corpus, Together With Respondents' Answer in Which They ". . . Admit the Factual Allegations of the Petition Well Pleaded . . .", It Clearly Appears That in the Illinois Criminal Trial Petitioner Was Denied Due Process of Law in Violation of the 14th Amendment by Admission in Evidence Against Him of a Confession Taken While He Was Under the Sedated Influence of a Drug Injected by a Police Physician; as a Consequence, the Undisputed Facts Show That the Illinois Courts Misconceived Petitioner's Federal Constitutional Rights, and Federal Courts Below Erred in Denial of Habeas Corpus Relief.

In order that this Court's jurisdiction may be focused upon the crucial federal constitutional question, petitioner relies solely on undisputed facts in the state court records, and on matters admitted or conceded in the course of these habeas corpus proceedings. *Thomas* v. *State of Arizona*, 356 US 390; *Haley* v. *State of Ohio*, 232 US 596. Thus we find:

It is not disputed that on January 1, 1954, at about 9:30 P.M., Dr. Clarence Mansfield, a police physician of the Chicago Police Department was called by an arresting police officer to administer to petitioner's illness in the police station.

It is not disputed that Dr. Mansfield examined petitioner, found that he was sick; and Dr. Mansfield decided to inject a solution consisting of phenobarbital and hyoscine.

It is not disputed that hyoscine is scopolamine, a drug which criminal investigators have named the "truth serum".

It is not disputed that before petitioner was given this drug injection by Dr. Mansfield, he was too ill to stand up, he was bending over, holding his stomach because of pain, and indeed, his condition was so serious that the Assistant States Attorney who was questioning him interrupted the interrogation and instructed the principal investigating officer to call a doctor.

It is not disputed that prior to the injection of the drug by Dr. Mansfield, petitioner had made no statement which could have been preserved as evidence against him.

It is not disputed that as soon as Dr. Mansfield left the police station; and significantly, without having told any police officer what he had done, or left any instruction to allow petitioner an opportunity to sleep or rest, petitioner was able to give four written confessions, all in rapid succession.

What event occurred that brought about this amazing transformation in petitioner's ability to confess? Petitioner says it was the drug injection. Therefore, it is important that we understand the pharmacological characteristics of scopolamine and phenobarbital.

An authoritative description of the pharmacological characteristics of hyoscine and phenobarbital is to be found in Goodman and Gilman, *The Pharmacological Basis of Therapeutics*, McMillan, New York (1955), page 541, "The alkaloid scopolamine (hyoscine) is found chiefly in the shrub *Hyoscyamus Niger* (Henbane) and *Scopola Carniolica* . . .". The effects of scopolamine on the human body are described by Goodman and Gilman on Pages 42 and 43 with a chart showing the characteristics of the drug. The authors then go on to say, Page 554:

> "Scopolamine in therapeutic doses normally causes drowsiness, euphoria, amnesia, fatigue, and dreamless sleep. . . . However, therapeutic amounts of scopola-

mine may occasionally produce excitement, restlessness, hallucinations, and delirium. Some, but certainly not all, of these paradoxical reactions may be classed as idiosyncrasy or as due to the administration of scopolamine to individuals with pain; . . . "

Gathercoal & Wirth, *Pharmacognosy,* 3rd Ed. (1956), say that "Scopolamine or hyoscine is an alkaloid obtained from plants from the solanaceae. Scopolamine hydrobromide or hyoscine hydrobromide is the hydrobromide of an alkaloid obtained from plants of the solanceae. It is extremely poisonous. (It) . . . is a powerful hypnotic and causes sleep which resembles natural sleep very closely."

Epitome of the Pharmacopeia of the United States and the National Formulary with Comments, 9th Ed., J. B. Lippincott Company (1951), pages 178-179, says "Scopolamine hydrobromide is extremely poisonous. . . . Used as a somnifacient in motion excitement and mania, but much less than formerly, as a preliminary to anesthesia and 'twilight sleep' in which it is dangerous unless used with great caution, because of its tendency to depress the respiratory center. . . . Uncertain in its action, sometimes producing acute delirium . . . ".

British Pharmacopoeia, The Pharmaceutical Press, London, (1958), pages 316 and 317, define hyoscine hydrobrom as synonymous with scopolamine hydrobromide. W. F. von Oettinger, *Poisoning,* Paul D. Hoeber, Inc., (1952), pages 455-456, describes scopolamine as dangerous because its use brings about absence of accommodation and accompanies the pharmacological reaction with auditory and visual hallucinations accompanied by motor unrest, headaches, vertigo and manic excitement or depression. von Oettinger says " . . . there is maximal mydriasis with complete rigidity of the pupils . . . "

Fein, *Modern Drug Encyclopedia and Therapeutic Index*, 8th Ed., (1960), The Reuben H. Donnelley Corporation, New York, page 1116, describes hyoscine or scopolamine as "a primary depressent of marked sedative and tranquilizing properties, producing drowsiness and dreamless sleep . . ." Fein says that hyoscine or scopolamine is a recognized treatment for the withdrawal symptoms of narcotic or alcoholic addicts.

The United States Pharmacopeia, 16th Revision, (1960), Mack Printing Company, Easton, Pennsylvania, pages 636-637, define hyoscine hydrobromide as synonymous with scopolamine hydrobromide and states their well-known authoritative pharmacological characteristics.

Goodman and Gilman, *The Pharmacological Basis of Therapeutics*, McMillan, New York (1955), pages 124-155, give an authoritative detailed pharmacological analysis of the attributes of phenobarbital. Significantly enough, this authority classified phenobarbital as one of the "hypnotic and sedative drugs." With regard to hyoscine or scopolamine, it is significant that in the chapter dealing with this particular drug, it is classified as an "autonomic blocking agent".

Speaking of scopolamine, the *Encyclopedia Britannica* says "scopolamine or hyoscine is a complex alkaloid closely related to atropine having the chemical formula $C_{17}H_{21}NO_4$. It is a laevorotary to polarized light. The therapeutic dose is 1/200's to 1/100 gram. The chief action of scopolamine is hypnotic, a condition very similar to natural sleep being induced. This usually lasts for six hours and the patient wakes up with an unclouded mind but may complain of thirst and dryness of the mouth and throat. In some cases the stage of excitement, giddiness and incoherent speech may precede that of sleep and it is this uncertainty of action which renders the drug somewhat unreliable. 20

Encyclopedia Britannica, 136, University of Chicago Press (1947).

The Dispensatory of the United States of America, pages 1222-1223, 25th Ed., Lippincott, Philadelphia, (1955), says of this drug that:

> "... in some persons the sleep it produces is attended with the kind of low muttering delirium recalling the mental confusion seen in atropine poisoning; ... many persons are excessively susceptible to scopolamine and toxic symptoms may occur. Such symptoms are often very alarming. There are marked disturbances of intellection ranging from complete disorientation to an active delirium resembling that encountered in atropine poisoning ..."

This was the drug which Dr. Mansfield, the police doctor, injected into petitioner (Rec. B, 213-215). This powerful and potent inhibitor of mental processes. This police doctor, experienced in such matters, *People* v. *Townsend*, 11 Ill. 2d 30, 14 N.E. 2d 729, chose this drug for injection because "it depresses and sedatizes, especially in full doses ..." (Rec. B, 215). "Phenobarbital, I found in my experience works very well combined with the other, whenever you don't want to put a person to sleep, but you want to quiet them; more of a psychic effect than reality ... by 'psychic effect', I mean pacify; it has an effect on the mind. An effect on the mind ...'"

Throughout his testimony (Rec. B, 992-1001), this police doctor repeated and emphasized that the purpose of the injection was to affect the mind of petitioner while he was being subjected to intensive police interrogation.

Historically, scopolamine is an interesting drug. From the dry rhizone of the plant *Scopola carniolica*, Schmidt, a German professor, isolated its principal constituent. The

result was a drug which he named scopolamine after the founder of the plant, Giovanni Antonio Scopoli, a Tyrolean doctor who had developed an avocational interest in the botanical attributes of Carniola, onetime Austrian duchy. Gilbert Geis, *In Scopolamine Veritas*, 50 J. Crim. L., C. & P. S. 347 (1959). Chemical analyses, following Schmidt's work, led to the conclusion that scopolamine was identical with hyoscine, a drug which had been extracted from the plant *hyoscyamus niger* about a decade earlier. Henry, *The Plant Alkaloids*, 84 (1949); Petty, *Narcotic Drug Diseases and Allied Ailments*, 168 (1913).

There is a respectable body of learning concerning scopolamine as a drug, its use in medicine and the attempted use of the drug in crime detection. This body of learning is characterized by authoritative treatises and articles by scholars, medical scientists, sociologists, and students of the law. The pharmacological properties of scopolamine, and its identity with hyoscine have long been common pharmaceutical knowledge. The descriptive phrase "truth serum" was invented by serious-minded medical scientists who understood the pharmaceutical qualities of the drug scopolamine, and of its power on the human mind. *Truth Serum*, 18 Texas St. J. Med. 231 (1922).

In its judgment of affirmance, the Court below said, 276 F 2d 324 at 329:

> "... His counsel's argument is sprinkled with the repeated use of the words 'truth serum'. These glib words have no recognized medical meaning, as Dr. Mansfield's testimony shows, and are evidently borrowed by petitioner from the jargon of science fiction ..."

Ordinarily, Petitioner would attribute this aspersive characterization of his argument as judicial impatience. How-

ever, because the Court below is wrong as well as unkind, Petitioner attaches to his brief an Appendix containing a small portion of the body of learning, legal, sociological, and medical, in which the words "truth serum" are used to aptly describe the drug scopolamine. Therefore, far from having borrowed the words "truth serum" from the jargon of science fiction, Petitioner has adopted an apt and descriptive expression invented by doctors who best understood the power of scopolamine over the human mind. *Truth Serum*, 18 Texas St. J. Med. 231 (1922). It is true that publicity seeking newspaper writers have used and abused the phrase; but the expression was not their invention. Gilbert Geis, *In Scopolamine Veritas*, 50 J. Crim. Law, C. & P. S. 347, 351 (1959).

The exact pharmacological attributes of the drug used on Petitioner by the police doctor is an important circumstance surrounding the statements taken from Petitioner and used to obtain his conviction. While it is true that this Court has said that ". . . time and again we have refused to consider disputed facts when determining the issue of coercion . . ." *Thomas* v. *Arizona*, 356 US 390, 402, it is also true that because of the delicate nature of the constitutional determination to be made in resolving the conflict between the fundamental interests of society in law enforcement and the constitutional rights of Petitioner, this Court will make its own examination of the record. *Spano* v. *People of the State of New York*, 360 US 315, 316.

In *Payne* v. *Arkansas* 356 US 560, 561-562, this court said:

> ". . . Enforcement of the criminal laws of the States rests principally with the state courts and generally their findings of fact, fairly made upon substantial and conflicting testimony as to the circumstances producing the contested confession—as distinguished from in-

> adequately supported findings or conclusions drawn from uncontroverted happenings—are not this court's concern; yet where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious. 'The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both'. The question for our decision then is whether the confession was coerced. That question can be answered only by reviewing the circumstances under which the confession was made . . ."

We ask that this Court make its own examination of the state court records because the Court below made eight manifest errors in construing the state court proceedings:

1. The Court below concluded that ". . . On a hearing, a record of the entire proceeding in the Illinois court was produced and considered by the District Court. No other evidence was offered or received by that court . . ." 276 F 2d 324 at 325.

The fact is that in the District Court while Petitioner was contending that he should be granted a full hearing with the opportunity to put in evidence, the Respondents were insisting that the District Judge was confined to a reading of the state court records. The District Judge in his memorandum order denied Petitioner an opportunity to introduce evidence and said ". . . justice would not be served by ordering a full hearing or by awarding any or all of relief sought by the Petitioner. This court is satisfied upon the full record before it that the findings of the state court that challenged confession was freely and voluntarily given by Petitioner are correct, and that there has been no denial of federal due process of law. According,

this court is of the opinion the rule should be discharged and the Petitioner dismissed . . . " (Rec. F, See: Transcript of Proceedings of June 12, 1959, pages 2-31; 64; and Memorandum Order of June 24, 1959).

2. The Court below concluded that " . . . At 9:45 P.M. Dr. Clarence E. Mansfield, a police surgeon, came. He spoke to none of the investigating officers, . . . " 276 F 2d 324 at 326.

The fact is that when Dr. Clarence Mansfield came to the police station, he was directed to the room in which Petitioner was sitting. It was Officer Cagney who spoke with Dr. Mansfield and identified Petitioner as the man that he, Officer Cagney, wanted Dr. Mansfield to see (Rec. B, 212, 224).

3. The Court below in its opinion concluded that "Petitioner attended a public inquest conducted by the Coroner of Cook County, Illinois on Monday morning January 4, 1954 . . . " 276 F 2d 324 at 326.

As a matter of fact, the inquests were held in the afternoon, at 1:00 P.M., Monday, January 4, 1954 (See: Respondents' Additional Answer to Petition for Habeas Corpus, Exhibit A).

4. The Court below concluded that Petitioner was " . . . advised by the Coroner of his right not to testify, but chose to do so, was sworn and again confessed to the Boone murder." 276 F 2d 324 at 326.

The State court records show that when Petitioner appeared before the Coroner, he refused to testify. (Rec. B, 385; See: Respondents' Additional Answer to Petition for Habeas Corpus, page 5, Exhibit B, I, and T.)

5. The Court below concluded that when the State Criminal Court disposed of Petitioner's motion to suppress the confession, Dr. Mansfield and Dr. Harry R. Hoffman, licensed physicians, and 17 lay witnesses testified for the state; and Dr. Charles D. Proctor testified for Petitioner. 276 F 2d 324 at 326-327.

State court records, however, conclusively show that Dr. Hoffman did not testify on the motion to suppress the confession. Dr. Hoffman testified after the confession was admitted in evidence (Rec. D, 1155-1181).

6. The Court below said: "On habeas corpus, the District Court's inquiry is limited to a study of the undisputed portion of the record. *Thomas* v. *Arizona*, 356 US 390 . . ." 276 F 2d 324 at 329.

The fact is that this Court has never said that on habeas corpus the District Court's inquiry is limited to a study of the undisputed portions of the record. What this court has said is that when the case reaches the Supreme Court of the United States, the application of the federal constitutional doctrines shall be made on the undisputed portions of the record, referring to the undisputed facts. The duties and functions of the District Judge and District Courts under the federal habeas corpus statute have been the subject of a carefully considered opinion of this court in *Brown* v. *Allen*, 344 US 443 and the definitive and instructive opinion of Mr. Justice Frankfurter in *Daniels* v. *Allen*, 344 US 443, 488-531.

It is apparent that the Court below is in conflict with the 2nd Circuit in its opinion in *Rogers* v. *Richmond*, 252 F 2d 807, when the Court erroneously applied *Thomas* v. *State of Arizona* and misconstrued the definitive rules laid down by this court in *Brown* v. *Allen*, 344 US 443, 488-531 and *Rogers* v. *Richmond*, 357 US 220.

7. The Court below in its opinion found "Petitioner asked for treatment by a doctor to relieve a condition induced by his narcotics habit; . . ." 276 F 2d 324 at 330.

The state court records show, and it was not found otherwise by the state courts, that Petitioner did not ask for treatment. It is true that the Petitioner asked for a doctor. The treatment that was given to Petitioner was the doctor's idea, not that of the Petitioner. Indeed, (Rec. B, 215), the doctor himself says that when he got to where the patient was on January 1, 1954, he decided what drug to give based on his diagnosis (Rec. B, 213-215). The decision was the doctor's; not Petitioner's. In fact, the doctor himself describes the interesting episode when ". . . the man asked me to inject it in his wrist. I says 'No, you take it the way I will inject it, up here.' I injected it in his shoulder . . ." (Rec. B, 215). The record does not support the Court below in this important regard.

8. Finally, the Court below concluded that "At 11:15 Assistant States Attorney Janega came and questioned Petitioner. . . ." 276 F 2d 324 at 326.

As a matter of fact, the state court records show that the Assistant States Attorney arrived at the Second District at approximately 9:15 to 9:30 P.M. He resumed questioning Petitioner immediately after the doctor left, at about 10:05 P.M. (Rec. B, 446, 449). We now know that at 10:40 P.M. the Assistant States Attorney took one statement from Petitioner; and that the interrogation was continuous because, in rapid succession, a statement was taken at 10:45 P.M., one at 11:05 P.M., and one at 11:45 P.M. (See: Respondents' Additional Answer to Petition for Habeas Corpus, page 5).

These errors of the Court below are crucial because they deal with the totality of the circumstances surrounding the

statements taken from Petitioner. As a result, the Court below failed to discern that the state courts did not make a fair determination of Petitioner's federal constitutional claim. In this failure, the federal courts below, the District Court initially, and the Court of Appeals on review, did not discharge the responsibility vested in them by Congress in the federal habeas corpus statutes. *Daniels* v. *Allen*, 344 US 443, 506.

For example, highly material to the question presented was Petitioner's age and mental condition as well as the condition of his incarceration. *Fikes* v. *State of Alabama*, 352 US 191, 193, 197. Yet the undisputed fact that Petitioner was, at the crucial time, a 19 year old mental defective was callously overlooked by the Court below.

Leyra v. *Denno*, 347 US 556 is clear authority in support of Petitioner's contention that he was denied due process by the admission in evidence of the statement taken from him while he was under the influence of a police injected drug. There, as in this case, the Petitioner was subjected to intermittent and intensive police questioning; and the evidence against him consisted mainly of several alleged confessions made to a state-employed psychiatrist. In *Leyra*, as in the case at bar, there was the subtle interplay of the doctor and the police. This Court held that under the circumstances, the confession taken and admitted in evidence in the state trial resulted in denial of due process.

The similarity between *Leyra* and the case at bar is revealed when this Court said: "'. . . the undisputed facts in this case are irreconcilable with petitioner's mental freedom 'to confess to or deny a suspected participation in crime' . . . the confession petitioner began making was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that the use of confessions

extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution." *Leyra* v. *Denno*, 347 US 556 at 561.

For this Court it is unnecessary to review the myriad of devices by which the human will can be subdued in the course of an unconstitutional inquisition. Before this court have come pure brutality, *Brown* v. *Mississippi*, 297 US 278; revolting violence, *Rochin* v. *California*, 342 US 165; misleading lies, *Spano* v. *State of New York*, 360 US 315; and domination of the mind by a dishonest psychiatrist employed by the prosecution, *Leyra* v. *Denno*, 347 US 556. The examples are never ending; and now Petitioner presents to this Court his case in which a police doctor subjected him to a drug injection because he wanted to "... quiet ..." Petitioner; he wanted to give Petitioner "... more of a psychic effect than reality ... By 'psychic effect' I mean pacify; it has an effect on the mind. ..." (Rec. B, 216).

Blackburn v. *Alabama*, 361 US 199 was the occasion in which Mr. Chief Justice Warren said: "The blood of the accused is not the only hallmark of an unconstitutional inquisition ..." And at the end of the last Term of this Court in *Reck* v. *Pate*, 367 US 433, said: "The question in each case is whether a defendant's will was overborne at the time he confessed. ... If so, the confession cannot be deemed the 'product of a rational intellect and a free will'. In resolving the issue all the circumstances that are attendant upon the confession must be taken into account."

All the circumstances, in Petitioner's case, include his mental defect, his 19 years with most of it as a social derelict, the overpowering domination of countless police and experienced police personnel aided by an experienced prose-

cutor. These are circumstances which impel the delicate constitutional determination that Petitioner was denied the due process of law by Illinois when it used a drug-influenced confession to obtain Petitioner's conviction and death sentence. *Culombe* v. *Connecticut*, 367 US 568; *Rogers* v. *Richmond*, 365 US 534.

Conclusion

For the reasons stated, it is respectfully submitted the judgment of the Court below should be reversed.

Respectfully submitted,

GEORGE N. LEIGHTON
Counsel for Petitioner

Appendix

1. Judicial decisions in which the description "truth serum" is used by the courts.

People v. *Hiveness*, 4 Ill. 2d 131, 122 N.E. 2d 231

State v. *Hudson*, 289 S.W. 920

Orange v. *Commonwealth*, 191 Va. 423, 61 S. E. 2d 267

People v. *Esposito*, 287 N.Y. 339, 39 N. E. 2d 925

Draper v. *Denno*, 113 F Supp. 290, aff'd, 205 F 2d 570 (2d Cir. 1953)

State v. *Cocklin*, 109 UT. 207, 194 Atl. 378

Lindsey v. *U.S.*, 237 F 2d 893 (9th Cir. 1956)

People v. *Ford*, 304 N.Y. 679, 107 N.E. 2d 595

Henderson v. *State*, 230 P 2d 495

People v. *McNichol*, 100 Cal. app. 2d 554, 224 P 2d 21

State v. *Lindmuth*, 56 N. M. 257, 243 P 2d 325

2. Learned treatises and articles in which the expression "truth serum" is accepted as accurate description of scopolamine or hyoscine.

Wigmore, *Evidence* 841a, 998 (3rd ed., 1940)

Silving, *Testing of the Unconscious In Criminal Cases*, 69 Harv. L. Rev. 683 (1956)

McDonald, *Use of Drugs in the Examination of Suspected Criminals*, 3 J. For. Med. 2 (1956)

Gagnieur, *Judicial Use of Psychonarcosis in France*, 40 J. Crim. Law 370 (1949)

Sargant, *Battle For The Mind* (1957)

Lindemann & Clarke, *Modifications in Ego Structure and Personality Reactions Under the Influence of the Effects of Drugs,* 108 Amer. J. Psychiatry 561 (1952)

Hanscomb, *Narco-Interrogation* 1 J. For. Science 37 (1956)

Dession, Freedman, Donnelly & Redlich, *Drug Induced Revelations and Criminal Investigations,* 62 Yale L. J. 315 (1953)

Redlich, Ravitz and Dession, *Narcoanalysis and Truth,* 107 Amer. J. Psychiatry 586 (1951)

Muehlberger, *Interrogation Under Drug Influence,* 42 J. Crim. Law 513 (1951)

Gerson & Victoroff, *Experimental Investigation Into the Validity of Confessions Obtained Under Sodium Amytal Narcosis,* 9 J. Clin. Psychotherapy 359 (1948)

Adatto, *Narcoanalysis As a Diagnostic Aid in Criminal Cases,* 8 J. Clin. Psychopathology 721 (1947)

De Ropp, *Drugs and the Mind* at 233, 234, 274, 275 (1957)

Underhill, *Criminal Evidence* 388 (5th ed. 1956)

House, *Use of Scopolamine in Criminology,* 18 Tex. St. Med. J. 259 (1922)

Lorenz, *Criminal Confessions under Narcosis,* 31 Wis. Med. J. 245 (1932)

Despres, *Legal Aspects of Drug Induced Statements,* 14 U. Chi. L. Rev. 601, 605 (1947)

Horsley, *Narco-Analysis* (1943)

Hanscom, *Narco-Interrogation,* 3 J. Forensic Med. 9 (1956)

Rolin, *Police Drugs* (1956)

MacDonald, *Truth Serum*, 46 J. Crim. L., C. & P.S. 259 (1955)

MacDonald, *The Use of Drugs in the Examination of Suspected Criminals*, 3 J. Forensic Med. 2 (1956)

House, *Why Truth Serum Should Be Made Legal*, 42 Med.-Leg. J. 138, 145 (1925)

Underhill, *Criminal Evidence*, Sec. 402 (5th Ed. 1956)

Annot. 45 A.L.R. 2d 1316 (1956)

Underhill, *Criminal Evidence* 141 (5th ed., 1956)

Annot. 23 A.L.R. 2d 1311 (1951)

McCormick, *Evidence*, Sec. 175 (1954)

Gagnieur, *Judicial Use of Psychonarcosis in France*, 40 J. Crim. L., C. & P.S. 370 (1949)

Herzog, *The Third Degree and Dr. House's Truth Serum*, 44 Med.-Leg. J. 34 (1927)

Gagnieur, *Judicial Use of Psychonarcosis in France*, 39 J. Crim. L., C. & P.S. 663 (1949)

Pearce and Clarke, *Value of Evidence Obtained Under the Influence of Drugs*, 24 Med.-Leg. J. 89 (1956)

Cens v. Heuyer; *Tribunal Correctionnel de la Seine*, Feb. 23, 1949 (1949) *Dalloz Jurisprudence* 284, (1950)

Donigan, *Chemical Tests and the Law* (1957)
Annot., 25 A.L.R. 2d 1407 (1952)

Truth Serum, 18 Tex. St. J. Med. 231 (1922)

Baker & Inbau, *Scientific Detection of Crime*, 177 Minn. L. Rev. 602 (1933)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8

CHARLES TOWNSEND,

Petitioner,

vs.

FRANK G. SAIN, SHERIFF OF COOK COUNTY; AND JACK JOHNSON, WARDEN OF THE COOK COUNTY JAIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 76.

CHARLES TOWNSEND,

Petitioner,

vs.

FRANK G. SAIN, SHERIFF OF COOK COUNTY; AND JACK JOHNSON, WARDEN OF THE COOK COUNTY JAIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS.

QUESTIONS PRESENTED

1. Whether the affirmance by the United States Court of Appeals of a district court's dismissal of a petition was erroneous where the State court record, upon which the district court based its findings, shows that a police doctor, called at petitioner's request, injected a drug, which is a recognized medication for narcotics withdrawal, in a dosé equal to one-half the recommended usual adult dosage, and where the record, with conflicts in testimony resolved against the petitioner, shows that the drug did not overpower him or deprivé him of capability of voluntary action.

2. Whether the petitioner can litigate a legal issue in Federal *habeas corpus* which he did not litigate in the State court in his appellate review of the challenged conviction even though the evidentiary basis for such claimed issue existed in the trial court record; and whether the petitioner can rely on coroner's minutes of inquests where such records have never been considered by an Illinois court because the petitioner successfully moved for their exclusion in the original trial.

STATEMENT OF THE CASE

The following is a statement of facts, as developed in the trial of this petitioner. It also includes a summary analysis of all prior proceedings.

Undisputed Facts

This record (R. C597-642) discloses that Jack Boone, Sr., a 43 year old steelworker who lived with his wife and his two sons at 3754 South Michigan Avenue, Chicago, Illinois, left for his place of employment on the morning of December 18, 1953. The apartment building in which he resided was set back from the sidewalk about 100 feet and was reached by walking along a narrow, dimly illuminated passageway. Approximately 6:00 o'clock that evening, Helen Clark, a friend of the Boone family, discovered the senior Boone lying in the passageway, face down, with blood on the back of his head, behind his right ear. Mr. Boone's wife was called and he was taken to a hospital where he died on December 21, 1953. When Boone had left for work, he had a pocket wallet and about four dollars on his person. This wallet was discovered during late morning, December 18, 1953, in an apartment building at 117 East 37th Place, Chicago, Illinois, by a 12 year old boy. This building was located near the Boone residence.

The boy gave the wallet to his father and he delivered it to his wife's cousin. This cousin in turn gave it to Mrs. Boone who delivered it to a Chicago police officer, George Martin, on January 5, 1954.

On December 29, 1953, officers of the Chicago police department arrested one Vincent Campbell (R. C769-771) who was later convicted and sentenced for robbery (R. C761). Campbell was still in custody during the early morning of January 1, 1954, when he accompanied police officers Martin, Fitzgerald, Cagney and Corcoran in a squad car to the vicinity of 35th and South Indiana where he identified for the police officers the petitioner, Charles Townsend walking with a friend (R. C643-645, C757-758). From his uncontroverted testimony it appears that Vincent Campbell knew the petitioner well. On a weekend during December, 1953, he saw Townsend walking in the neighborhood with a house brick in his hand. Campbell asked the petitioner how he was doing and the petitioner replied that he was going to make some money. Three or four hours later, he saw the petitioner in a billiard hall at 35th and South Prairie. At that time, Townsend entered the hall carrying a brown paper bag, torn on one end and wrapped around a house brick. He laid this bag on a nearby bench and asked to play with them. (R. C745-762)

The petitioner was arrested on January 1, 1954 about 1:45 A.M. He was 19 years of age and a confirmed heroin addict since 1952. By December of 1953, the petitioner was taking as much as six capsules a day (R. B92-93, B158-161, C811). One and one-half hours prior to his arrest, the petitioner injected himself intravenously with two and one-half capsules of heroin (R. B93, B192, B810). The petitioner had been unemployed throughout 1953 with the exception of an eight or nine day period during which he worked intermittently (R. B160-161).

The Director of the Behavior Clinic of the Criminal Court of Cook County, who supervised the petitioner's Court ordered psychological and mental examinations before trial to determine the petitioner's ability to cooperate with his counsel and conduct his defense, testified that his diagnosis of the petitioner reflected a character disorder and drug addiction. A psychological I.Q. of 63 was determined for him (R. C782-784, D1027). When this was translated in terms of his mental I.Q. it attained a range between 75 to 80 for the petitioner. This was still in the area of below average intelligence and classified him as a mental defective. Nevertheless, he was legally sane and this figure compared favorably to the World War II average mental I.Q. of 78 (R.D1027-1030).

The arresting officers took the petitioner to the 2d district police station at 29th and South Prairie. They arrived at about 2:30 A.M. At the station the petitioner was asked his name and address and other identifying information by the lockup keeper who made out the arresting slip. This took about 5 or 10 minutes (R.B95, B251-252, B256). The petitioner was wearing a dark suit (R.B398) and a sport shirt without a tie (R.B 347). He was neatly dressed and answered the questions of the lockup keeper clearly and coherently (R.B 253).

Thereafter arresting officers took the petitioner to one of the rooms and questioned him for 30 or 35 minutes concerning various crimes which the petitioner denied having committed (R. B96, B253-254, B281, C647, C656). Thereafter, he was placed in the women's cell alone and about 5:00 A.M. was transferred to the 19th district station, which is located at 35th and South Wentworth. He arrived here about 5:10 A.M. He was interrogated by no one at the 19th district station. He remained there until that evening. Sometimes he would lie on his bunk and sometimes he would sit or sleep on it. He was returned to the

2nd district station about 8:30 P.M. (R. B 98, B 100, B 170, B 269, B 270-273). Although the petitioner admitted that food was available at the 19th district station (R. B 141), he refused food when it was offered to him (R. B 267).

About 8:30 P.M. at the 2d district station officers Cagney and Fitzgerald removed the petitioner from his cell. A short time later, a show-up was conducted in one of the rooms. The petitioner and three other prisoners were viewed by an insurance agent, Gus Anagnost, who identified one of the three other persons as the man who had robbed him. Mr. Anagnost then left the room (R. B 102-104, B 292, B 349-355, B 423-424, B 476-477). Immediately thereafter, a fight broke out between Townsend and the prisoner identified by the insurance agent (R. B355, B426-428, C704-705, C826-827). Townsend was not injured (R. B357). All four arresting officers witnessed the show-up which lasted about ten minutes (R. B 295, B 349, B 423-425, B 477-478).

Shortly thereafter, petitioner was questioned in the same room by officer Cagney about the Boone killing and other matters for at least ten minutes (R. B 107, B 347-350, B 649-652). To the time of the show-up, petitioner's appearance was neat and his speech was clear, distinct and coherent (R. B 252, B 260-261, B 263-264, B 267, B 276, B 322, B 347, B 422-423). After his arrest, he had admitted that he was a narcotics addict to the arresting officers, and that he had, only one and one-half hours earlier, given himself a shot. He complained to no one, at least up until the time he had been returned to the 2d district station at about 8:30 P.M., that he was sick (R. B99, B267, B270, B273, B323, B355, B358, B422). It was sometime during the questioning by Cagney, that petitioner complained of "stomach" pains and was occasionally holding his abdomen. Cagney then telephoned for a doctor (R. B108, B109-110, B352-353, B357-358, B360-361).

Shortly afterward, the doctor came. He was a police surgeon assigned to the central police station located at 11th and State Streets (R. B 111, B 211). Earlier, an assistant state's attorney had arrived at the 2d district police station (R. B 296, B 352, B 430-431, B 447, B 479, B 481). When the doctor arrived, he entered one of the detectives' rooms where petitioner was waiting (R. B 112-116, B 334). Cagney was present (R. B 116, B 334, B 367-368) when the doctor examined the petitioner, tested his heart and eyes, and when he used a hypodermic syringe to inject a solution into the petitioner (R. B 111-113, D 982).

Before the hypodermic injection, the doctor asked Cagney to obtain a glass of water; he then rinsed the needle and syringe in the saline solution, having first dropped a sodium chloride tablet into the glass. Then he withdrew about 2 cc.'s of saline solution into the syringe from a little bottle, dropped a ¼ grain of sodium phenobarbital and a 1/230 grain of hyoscine hydrobromide into the syringe solution to dissolve them and injected the solution into petitioner (R. B112-113, B214-215, B 240, D981-982, D988-989). He left four one-quarter grain phenobarbitals, five according to petitioner's testimony, and instructed the petitioner to take two around midnight and the others in the morning. Petitioner took two that night and the remainder the next day (R. B114-115, B126, B198, B216, B235, C835, C850-851). During the preliminary hearing, petitioner testified that he was neither questioned by nor saw an assistant state's attorney that evening. He later testified on the trial that he could not remember seeing the assistant state's attorney before the afternoon of January 2. Through impeachment by way of a transcript of his testimony at his earlier trial under indictment No. 54-10, tried in 1954, he admitted that he had previously testified under oath that he had seen and

given a statement to the assistant state's attorney during the evening of January 1, at the 2d district police station (R. B132, C877-902).

After the doctor left, he was returned to his cell, although it is disputed whether he was again removed and taken again that evening to one of the detectives' rooms (R. B122-125, B172-177, B272-273, B297-304).

He was not questioned or disturbed until sometime between 11:00 A. M.-1:00 P. M. of the following day, Saturday, January 2, 1959. Then he saw and talked with Cagney and Fitzgerald and the other two arresting officers, Corcoran and Martin (R. B126-133, B275-276, B305, B375, B393-394, B429, B482), at which time he was told he would be going to the state's attorney's office. He was taken there in a police car by officers Cagney, Fitzgerald, Corcoran, and one Ellington, who was not a police officer but a witness, (R. B133-134, B177-178, B305, B375-376, B482). They arrived at the state's attorney's office, where they saw the assistant state's attorney who had been at the 2d district station the previous night (R. B133-134, B178-179, B306-308, B339, B376, B441). There, after he had been given a copy of a transcribed typewritten statement, consisting of four pages by the assistant state's attorney, and after he had been asked by the assistant to read petitioner's copy while the assistant read the original transcription, petitioner signed each page in the presence of the assistant, and in the presence of Cagney and Fitzgerald who witnessed petitioner's signature to People's Exhibit 2 in evidence (R. B135-136, B286, B288-289, B306-307, B339-341, B376, B442-444, C714, C715, C717, C737, C739-743). This transcribed confession, which was read into the record before the jury (R. C739-743), shows that prior to his answers to the questions he acknowledged that no threats or promises had been made to induce his confession. After he signed his confession, the petitioner was returned to the 2d district police

station where he arrived about 3:00 P. M. of the same day, Saturday, January 2 (R. B138, B307, B311, B394). The lockup keeper observed nothing unusual about petitioner's appearance upon the latter's return. He talked to him briefly. The petitioner spoke coherently and did not complain about anything (R. B394-395).

On Sunday, January 3, the arresting officers questioned petitioner from time to time, between 10:00 A. M. and 4:00 P. M. (R. B277, B312-316, B434-435, 489). That evening, he asked Cagney to call the doctor again because he was not feeling too well. Cagney again telephoned for the doctor. The police surgeon, who previously had treated the petitioner, arrived that evening (R. B138, B220-221, B287-388). The petitioner told the doctor that the previously prescribed medicine did not help him. He was not feeling too well. The petitioner was given a number of white tablets, each ½ grain phenobarbital, to take orally (R. B139, B221, B239, C850-851).

The following morning, Monday, January 4, the petitioner was taken to the coroner's inquest at the Cook County morgue, which was open to and attended by the public, among whom was his sister, the assistant state's attorney who had previously taken the statement from him, and the four arresting police officers. After being advised of his right not to testify and of the fact that any statement made by him might subsequently be used as evidence against him, petitioner under oath again proceeded to confess the Boone murder (R. B143-148, B178-181, B184, B316-317, B380-381, B383-385, B433-435, B445, B488, C692, C905).

Disputed Facts

During the preliminary hearing on his motion to suppress and during the trial, the petitioner gave certain testimony, which was disputed by the evidence of the prosecution. It is

this disputed testimony, which actually gives rise to the issues in this *habeas corpus* proceeding.

The petitioner testified that, upon his arrest on January 1, 1954, he was taken to the 2d district station and interrogated for a total of thirty minutes by Officers Cagney and Fitzgerald (R. B96). Approximately five to ten minutes of this period were devoted to interrogation regarding the Boone murder, of which the petitioner denied any knowledge (R. B95-96). Before he left for the 19th district station, he stated that he was questioned again about 4:00 or 5:00 A. M. of the same morning (R. B97). Interrogation was not resumed until 9:00 P. M. of the same day upon his return to the 2d district. This questioning was conducted by Officers Cagney, Fitzgerald, Martin and Corcoran (R. B99, B101, B156-158). The evidence for the prosecution reflects that the petitioner was not questioned about the Boone murder until about 9:00 P. M. Friday, January 1, 1954 (R. B372-373, C647-649, C656). He was being held for investigation of several murders and robberies (R. B401). He was not questioned around 4:55 A. M. Friday immediately before his transfer to the 19th district station (R. B254-255). During the course of the interrogation Friday evening, the petitioner, in response to one of Cagney's questions, admitted the Boone murder and robbery (R. C649-652). The four arresting officers questioned the petitioner between the short show-up and the arrival of the assistant state's attorney (R. B348-352).

Before the interrogation on the evening of January 1, 1954, the petitioner testified that he was in a show-up with Vernon Campbell, George O. Jackson and Theodore Redd when an insurance man identified Redd as his robber (R. B102, C823). Thereupon, Cagney stepped out into the hallway with the insurance man and the petitioner heard Cagney tell him that he had identified the wrong person and that the petitioner should have been identified (R

B102-104). The petitioner then testified that Officer Fitzgerald told him that he, the petitioner, knew that he was the robber. Fitzgerald then struck him in the abdomen, whereupon the petitioner fell to the floor on his knees and vomited water and blood (R. B105-106, C827). During the trial, the petitioner added to his testimony. He stated that first Fitzgerald and then Cagney had slapped his face (R. C819, C821). After the identification by the insurance man, the petitioner turned to Redd and inquired as to whether the latter was satisfied since the other three prisoners in the show-up had "told lies" on him. He and Redd began to fight and wrestled to the floor where they were finally separated by the police officers (R. C826-827). Witnesses for the prosecution testified that the show-up began about 8:45 P. M. (R. B423, B427, B481) and lasted about ten or fifteen minutes (R. B478). Vernon Campbell, Oliver Johnson and George Hare were in the show-up with the petitioner (R. B292, C682). The insurance agent identified Oliver Johnson, left and never returned (R. B292, B353, B424, B476-478). The police officers denied that they talked to the insurance agent after the identification and urged him to change it or later caused the petitioner to admit that he robbed him (R. B293, B336, B353-354, B425-426, B479). After the insurance agent left, the petitioner laughed. Oliver Johnson said, "What do you want to do me like that for?" Then, he swung at Townsend with his fist and they wrestled to the floor. They were separated by Officers Corcoran and Martin. This commotion brought Officers Fitzgerald and Cagney back into the room (R. B355, B426-427, C704-705, C774). A short time later, the petitioner said to Oliver Johnson, "Don't worry, man, I'll take you off the hook" (R. C705). Then Vernon Campbell told the petitioner, "Charley, why don't you tell the truth and tell them you are the guy that is going around hitting people on the head with a brick?" (R. C705-706).

The arresting officers, as well as the lockup keepers, denied that they struck, threatened or abused the petitioner either before, during or after the show-up. They did not see anybody else do so in their presence (R. B255, B283, B334-335, B337, B340, B417-418, B467-468). They testified that the petitioner voiced no complaints during this period (R. B255, B267, B270, B273). They made no promise that they would attempt to procure morphine for him, send him to the hospital, call a doctor, or promote leniency or immunity from prosecution in return for his confession (R. B283, B284, B334-336, B337, B341-342, B418, B468, B470). The petitioner did not vomit water or blood in their presence; they saw no blood or water (R. B283-284, B294, B335 B418, B433, B467). The two attending janitors, who worked the following morning, found no blood or water in any of the detectives' rooms (R. B401-408, B410-414). During the period in question, the petitioner did not sweat nor did he appear nervous or exhibit other unusual behavior. He spoke coherently and otherwise behaved quite normally (R. B322-324, B347, B359, B362, B423, B479-480).

The petitioner testified that shortly thereafter the officers began to question him again and then returned him to his cell (R. B107). Officer Cagney asked the petitioner if he was ill and the latter advised the officer he was sick from using narcotics (R. B107-108). About five or ten minutes later, Cagney told the petitioner that he would call the doctor (R. B110). Shortly thereafter, the petitioner testified, the doctor came into the room (R. B111) but not before he conferred with the police officers in the hallway (R. B112). The prosecution witnesses testified that, shortly after the show-up, the petitioner began to complain of abdominal pains, was holding his abdomen with his hands, and was leaning over. The petitioner asked to see a doctor and Cagney called for the police surgeon. The petitioner also requested a "jolt" (R. B353, B355, B357,

B360-361, B428). About 9:30 P.M., before the doctor's arrival, the assistant state's attorney arrived (R. B352, B430-431, B481). The assistant state's attorney, in Cagney's presence, asked the petitioner a few questions but the petitioner, who appeared nervous and was complaining of abdominal pains, stated that he would rather not talk until he saw a doctor. In response to the assistant's question, the petitioner again requested a doctor at which time Officer Cagney advised the assistant that he had already summoned the doctor. The assistant state's attorney left the room and the doctor came about 9:45 P.M. (R. B358-366, B447-449). The doctor was directed to the detectives' room by the desk sergeant and spoke to none of the arresting officers before he saw the petitioner or administered to him in Cagney's presence (R. B223-224, B284, B293-295, B334, B359, B366-368, B429-431, B449, B469, B479).

The petitioner testified that the doctor arrived about 10:00 P.M. and remained only a few minutes (R. B114, B171). He told the petitioner to unbutton his shirt, checked his heart and looked at his eyes. He opened a little black bag and took out some powder. He placed this powder in a syringe, dissolved it with water, clamped the petitioner's left arm with a rubber band until a vein bulged and injected the solution into the vein (R. B112-113). The doctor then gave him five pink or red pills and directed the petitioner to take two immediately and the balance in the morning (R. B114-115, B197-198). The petitioner took three with water (R. B115, B198). All four arresting police officers were present at the time. In response to a question from Cagney, the petitioner stated that he felt "all right" (R. B116-117). Up to that time, the petitioner testified that he had denied all criminal accusations (R. B111). The police surgeon testified that he thoroughly examined the petitioner's chest, back, neck, head, face, arms, and hands. He palpated over the petitioner's chest with his

hand and fingers, and then used his stethoscope. The doctor inquired about the marks on his left arm. The petitioner explained that he was ill from narcotics withdrawal and described his pains for the doctor. The doctor observed a cold perspiration over the petitioner's face, neck, body and arms. He diagnosed the petitioner's symptoms as resulting from drug addiction and withdrawal (R B212-215). He dissolved a sodium phenobarbital tablet and a piece of a hyoscine tablet (not powder) in the syringe, and after the injection he gave the petitioner only four white, not five pink or red tablets (R. B214-217, B235-236).

The doctor did not tie or bind the petitioner's left arm with a rubber band. He injected the solution into the shoulder muscle of the petitioner's left arm and not in any vein (R. B368, D982), even though the petitioner asked that it be injected into his wrist (R. B215). Examination by the doctor disclosed no bruises on the petitioner. The petitioner did not complain of any bruises or nausea. He could not see or smell any evidence of vomit (R. B222-223). After the injection, the petitioner said he felt better. (R. B370). He placed the four tablets, given to him by the doctor, into one of his pockets and took none, if any, until midnight (R. B304, B341, B370).

The petitioner testified that, after the injection, the insurance agent was returned. By this time, he was feeling "dizzy", sleepy in other words (R. B117, B119). He could see no more than two feet in front of himself. Prior to the injection, his vision was satisfactory. Things now looked dim and he could no longer hear too well (R. B118-119). He heard someone say that he should admit the robbery of the insurance man. He replied in the affirmative but does not know why (R. B210). He had no memory after the drugs, and this condition continued until the afternoon of the next day (R. B151-153). The next thing the petitioner remembered is being seated next to a desk and

seeing a person he did not know. He was sleepy. He actually fell asleep but was awakened by Cagney (R. B121-122). He could see only poorly. Cagney handed him a pen and told him to "sign", stating that the petitioner was going out on bond. He does not recall what he signed (R. B122-123). He assumes he was taken to his cell because later Cagney awakened him and took him back to the detectives' room (R. B123, B172-175). There were quite a number of people in the room and bright lights were flickering in his face. He did not recognize anybody or see very well (R. B123, B176). He was sitting and was told to hold his head up. The lights flickered for a minute or so. He was returned to his cell where he was left undisturbed the remainder of that night (R B124-125, B176).

According to the testimony for the prosecution, the petitioner had specifically been questioned for the first time since his arrest, about the Boone murder about 9:00 p.m. (R. B372, B433, B656). After the doctor's treatment and immediate departure, which was about 10:30 p.m. (R. B216, B298, B370, B456), petitioner was again visited by an assistant state's attorney, who either then or earlier had been introduced as such to petitioner (R B371, B450). He was questioned by the assistant about 25 minutes (R. B372). The assistant asked Townsend how he felt and the petitioner replied, all right. The assistant observed that Townsend, who prior to the doctor's arrival had been shaking a little and complaining of cold chills (R. B448, B450, B456), now exhibited a normal appearance and spoke more strongly (R. B455-457). He did not know what the doctor had administered to petitioner, if anything, but he knew that the petitioner had been seen by the doctor (R. B451). He would not have questioned petitioner if he had known that the doctor had given petitioner anything which would affect his mental processes adversely. (R. B452-454).

Thereafter, petitioner, the assistant, Fitzgerald, Cagney,

and a court reporter, employed by the state's attorney's office, went into another larger room, where there was a desk. Petitioner's confession concerning the Boone murder was dictated to the court reporter for about 10 minutes, beginning about 11:15 p.m. Only the assistant questioned petitioner, who answered clearly, distinctly and coherently (R. B282, B298-299, B301, B370-373, B391-392, B304, B374-375, B481). The assistant State's attorney had left about 11:30 p.m. (R. B726-727).

The arresting officers testified that none of them, nor anyone in their presence, ever gave papers to the petitioner for signature or placed a pen in his hand. They did not see the petitioner identify himself as the robber to the insurance agent nor did they induce him to do so. They did not see flickering lights in the evening of January 1, or at any other time (R. B285-286, B336-338, B418-419, B469, B472, B487).

The petitioner testified that he took the balance of the pills on Saturday afternoon, January 2 (R. B126). Up to Saturday morning, he did not remember that he confessed the Boone murder to anyone. His head was much clearer now (R. B126). He saw Cagney Saturday morning between 10:00 and 11:00 a.m. and Cagney showed him a newspaper, which carried the petitioner's photo and a story that he had confessed the previous night (R. B123-127). Thereafter, he was taken to the detectives' room by Cagney and two others and was questioned about all the robberies and murders around 55th Street. He confessed to all of them (R. B128-130). He was then told that he would be taken to the state's attorney's office (R. B131).

The petitioner testified that no assistant state's attorney had talked to him prior to this time and he could not remember any statements he had made Friday night (R. B132-133). He had no clear memory again until Saturday afternoon (R. B152). He had never previously seen the

assistant state's attorney, whom he met Saturday afternoon (R. B135). In the earlier trial under indictment No. 54-10, tried in 1954, he testified under oath that he had seen and given a statement to the assistant state's attorney during the evening of January 1 at the 2d district police station (R. C877-902). The assistant handed the petitioner some papers and asked petitioner to read along with him. He claims he was still half asleep and could not see as well as ordinarily. He could not make out the words on the papers and he did not understand what the assistant was reading (R. B135). Cagney asked him to sign and he signed without objection. He does not know why (R. B136). He was then returned to the 2d district station (R. B138). He did not read the papers which he signed nor did he know what they were (R. B138).

The arresting police officers testified that none of them had shown the petitioner a newspaper, the following morning, January 2 (R. B285-286, B336-338, B418-419, B469, B472, B487). No newspaper photographs were taken until later that Saturday afternoon while the petitioner was going to the state's attorney's office, and later at the inquest (R. B380). Witnesses for the prosecution further testified that, at the state's attorney's office on Saturday afternoon, January 2, the petitioner was given a copy of the Boone murder confession, which had been stenographically recorded Friday night and which was now transcribed and typewritten. The petitioner appeared to be following the assistant as the latter read from the original; he turned the pages as the assistant turned the pages. The petitioner signed each of the four pages. He did not appear sleepy or complain in any manner. The petitioner was not abused, threatened or promised anything to obtain his signatures (R. B286-289, B308-310, B340-341, B376-379, B440-455). The police officers denied that at anytime Saturday they questioned the petitioner any further re-

garding the Boone murder (R. B311-316, B432-435, B438, B489). They did not prompt him in any manner whatsoever before the visit to the state's attorney's office (R. B287-288, B315-317, B339, B341-344, B418-419, B471-472).

The petitioner testified that he saw the doctor again Sunday night, January 3. He informed the doctor that he was not feeling well and received six or seven white pills that looked like aspirin. He was instructed to take four at that time and the balance the following morning, namely Monday (R. B139, C850-851). Thereafter, his eyes refused to remain closed and he could not sleep at all. He had to force his eyes to remain closed. "I would have them gripped together." He took the rest of the pills Monday morning (R. B140, C850-851). The doctor testified that he saw the petitioner a second time on Sunday evening, January 3, when the petitioner told him that the "medicine I gave him the other night didn't help him any". (R. B221). On Sunday evening, the doctor gave the petitioner only two ½ grain phenobarbital tablets (R. B238-239).

The petitioner further testified that on Monday morning, January 4, he went to the inquest. Before this, Cagney again took him into one of the detectives' rooms, where the other arresting officers were present. He asked the petitioner if he could remember his confession of Friday night (R. B140-143). The petitioner replied that he did not even remember making a statement at all. All the officers laughed (R. B143). Cagney read the statement to him, and in the police car instructed him not to change his statement at the inquest (R. B143). At the inquest, the petitioner testified and admitted the Boone murder (R. B148). The police officers denied that they had prompted the petitioner at any time before the coroner's inquest of January 4, where the petitioner again confessed the Boone murder (R. B287-288, B315-317, B339, B341-344, B418-419, B471-472).

Expert Testimony

Dr. Mansfield, the police surgeon, testified that hyoscine is a drug used many times by him to depress and sedatize drug addicts, as well as people of psychopathic tendency (R. B215). A sedative is a drug or medication utilized and given to quiet a person, settle his nerves or put him to sleep (R. B224-225). Phenobarbital is also a sedative and, being a barbiturate, it is also an anodyne or pain-deadener (R. B225-226). In this case, however, he considered it the sedative, and hyoscine the anodyne (R. B225-226).

He had examined about twenty thousand narcotics addicts in his experience, about seventy percent of whom were addicted to heroin (R. B217-218). He had treated about six to seven thousand cases of narcotics withdrawal cases (R. B218). In about fifty percent of that number he had used the same injection and treatment he administered to the petitioner (R. B218, D1010).

Acute withdrawal symptoms, he testified, usually include complaints about pain in the abdominal area, of sickness, weakness, and an inability to remain emotionally still. The patient is restless and talkative; moist perspiration usually covers his face and body. In severe cases, he will vomit on the least provocation. He cannot keep water down, nor take food—in fact, he will refuse food, except sweets like candy or chocolate. He desires quiet. He suffers spells of quietude and sleep, then wakefulness with hilarious screams (R. D1017-1018).

The phenobarbital, based on his experience, combines very well with hyoscine in the proportion and quantity used to quiet the addict, to pacify his mind, to delay emotions of hilarity, noisiness and excitation (R. B215-216), without putting him to sleep (R. B215-216, B228). The addict in withdrawal is suffering from a nervous reaction

(R. B247), and the small amount of phenobarbital injection counteracts the activity of the sympathetic nerves, especially in the abdominal area (R. B243), while the hyoscine relaxes (R. B226-227). The combination given rests and relaxes the subject (R. B227, B243, D1019).

He could recall no case in his experience where his use of the drug hyoscine produced amnesia or loss of memory. He considered that the injection used on Townsend, alone or together with the sodium phenobarbital tablets for oral administration, could not have resulted in loss or lapse of memory in the case of petitioner or have impaired his vision or otherwise adversely affected his mental condition to the point of depriving him of his will or putting him to sleep. He denied using the drugs for that purpose (R. B216, B218-220, B228, B231-232, D982-983, D1001, D1010). He used the injection and treatment in question because petitioner was tense and firm (R. B226). In order to sedatize completely and narcotize petitioner, he would have had to have administered three or four grains of phenobarbital (R. B233) or a ½ grain of hyoscine (R. D988-990), or one and one-half to two grains phenobarbital to put him to sleep (R. B243). The creation of amnesia would require 1/100 of a grain of hyoscine, the so-called normal dose, plus another 1/60 of a grain of hyoscine, or a large dose of phenobarbital and hyoscine combined (R. D1008-1009).

On cross-examination during the preliminary hearing, the colloquy ran as follows at one point (R. B228):

> Q. You gave him something that would knock him out?
>
> A. No, sir.
>
> Q. Doctor, you testified before, in a case where this man was being tried?
>
> A. Yes.
>
> Q. Did you give him any truth serum or anything—
>
> A. No.

Q. —that you considered that?
A. No.
Q. You never told anybody that you did that?
A. I never saw any in my life.

Testifying on behalf of petitioner, both during the preliminary hearing and upon the trial, Dr. Charles D. Proctor stated that he was not a licensed physician, but possessed a doctorate in pharmacology and toxicology (R. B495-499). At the time of the trial, he was an assistant professor in pharmacology and toxicology at Loyola University Medical School (R. C498). He had worked for the Cook County Coroner's office, with and for doctors, and at the Cook County Hospital (R. C504). He testified that he is acquainted with the drugs hyoscine and phenobarbital (R. C499-C500), and acquainted with leading and recognized pharmacological and toxicologial and other related medical texts on therapeutics and physiology (R. C506-507). He admitted that he has never prescribed treatment for drug addiction and had never observed the effect of hyoscine on human beings. His experience was virtually limited to text book materials (R. C564-566).

He considered the normal range of hyoscine drug injection between .25 and .3 milligrams, translating 1/100 grains hyoscine to .6 mgm. and 1/200 to .3 mgm. (R. D1090-1092). He considered the administration here, that of a fraction less than .29 mgm. well within the normal range (R. D1092). He considered the one-eighth grain phenobarbital given hypodermically a very low sedative dose, and further considered a ¼ grain a very low dose (R. D1093). He placed the normal dose of phenobarbital for sedative effect at 45 mgm. to 60 mgm.; 60 to 90 mgm. were necessary for hypnotic or sleep-producing effects, whether administered orally or hypodermically; he equated one-half grain of phenobarbital to 30 mgm. (R. D1090-1091).

Hyoscine, in his opinion, exaggerates three symptoms of the narcotic addict's withdrawal stage—restlessness, prostration and excitation. The disorientation of the addict would be increased, affecting consciousness and memory within a wide range, from zero to all (R. C506-507, C555, D1087, D1094). Within this wide range, it accordingly produces no severe amnesia or memory loss as to details and events occurring during the period under the influence of hyoscine (R. C506-507, C537-538, C552-553, C580). There would also be effected an impairment of the person's consciousness, ability to reason and of his vision (R. C537-540, C542-543, D1087, D1089, D1118-1122). In its possible effect on the central nervous system, as a depressant, hyoscine could effect results ranging from absolute sleep, preceded by apathy and drowsiness, on the one hand, to complete disorientation and excitation and prostration and restlessness. (R. D536, D1118-1122). The duration of amnesia would be the same for an addict as for a normal person (R. D1094).

Phenobarbital, another depressant, would add to and exaggerate the depressive effect of the hyoscine (R. 537); it indirectly affects the subject's consciousness (R. D1089).

The effects of hyoscine on the subject's vision are described in terms of paralysis of the nerves, enervated sphincter muscles of the iris and of the ciliary muscle in eye lens, producing pupil dilations, cycloplegia, or loss of the ability to accommodate vision. This causes the subject to see objects more clearly at a distance than close up (R. C537-538, 568). This impairment of vision ordinarily lasts from four to six hours (R. C542). All of the effects from hyoscine last from five to eight hours (R. C538-540, C533-534, D1089, D1124).

Concerning the hypothetical case wherein an injection of .3 mgm. hyoscine, a slight fraction more than the .289

mgs., or 1 230 grains were used, Dr. Proctor's expert opinion was that the total drug injection and treatment resulted in impairment of the hypothetical person's ability to reason and of his vision. It increased disorientation, restlessness, anxiety, excitation and prostration; he suffered memory loss or amnesia and partial consciousness (R. C506-507, D1119-1121, D1125). He could, however, not actually describe the extent to which these symptoms or results operated here. He further based much of his testimony on the premise that the drug injection here operated at the first stage of the narcotics withdrawal symptoms or syndrome, which he estimated usually manifests itself from ten to twelve hours after the last narcotics injection (R. C535-536, C581).

During the course of his direct testimony, petitioner's counsel asked his own witness the following question (R. C541): "Mr. Branion: Q. "Doctor, is hyoscine a drug that is given to pregnant women who are about to have a baby, to induce twilight sleep?" " and the expert answered, "Yes", which was later stricken for reasons not here pertinent.

Dr. Harry R. Hoffman, a licensed physician since 1910 (R. D1154-1155), and a specialist in nervous and mental diseases, testified for the prosecution on the trial in rebuttal. Between 1931 and 1941, he organized and directed the Behavior Clinic of the Criminal Court of Cook County, and was presently on the staff of that clinic (R. D1156-1157). He stated that he had used hyoscine as well as phenobarbital in his practice many times (R. D1157-1158). He has observed no case where hyoscine in normal dosage caused amnesia (R. D1159). With reference to the hypothetical person posed (*i.e.*, Townsend for all effects and purposes), he stated the injection in question could not have caused amnesia, nor put the subject to sleep (R.

D1160-1163). He referred to an old text, Lambert Towns Treatment of Drug Addicts, which advocates use of hyoscine (R. D1168). He himself has never used hyoscine in narcotics cases (R. D1167-1168). He considered the drug's effects upon a confirmed narcotics addict would be less pronounced than upon a normal individual (R. D1172). A similarity of symptoms, e.g., dryness of mouth and some difficulty in accommodation of vision would be present in both (R. D1169).

This witness had experience with hyoscine in treating palsy patients while a student at Rush Medical College and while he worked in the out-patient clinic. Palsy patients are treated with this drug because it has an effect on involuntary movements of the individuals in conjunction with morphine, hyoscine or scopolamine produce twilight sleep. Scopolamine is hyoscine.

The average adult dose of hyoscine is 1 200 to 1 100 grain (R. D1176).

Analysis of Prior Proceedings

The petitioner has prosecuted various proceedings since the challenged judgment of conviction was entered over six and one-half years ago. We have undertaken to present a summary analysis of those proceedings, all of which constitute a part of the record in the present action. This summary also includes an analysis of four petitions for writ of *certiorari*, judicial notice of which will be taken by this Court. *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 555.

In this analysis, attention is focused upon the contentions and representations made by the petitioner at a specific time. This summary is divided into three parts: first, the direct review of the trial by way of writ of error in the Supreme Court of Illinois, which resulted in affirmance by

that Court and denial of *certiorari* by this Court; second, the statutory post-conviction review, which was denied by the trial court, whereupon the Supreme Court of Illinois denied the writ of error and this Court denied *certiorari*; third, the federal *habeas corpus* proceeding, which was eventually dismissed by the district court, whereupon the United States Court of Appeals affirmed the judgment of dismissal and this Court granted *certiorari*.

I.

The challenged judgment of conviction was entered in the Criminal Court of Cook County on April 7, 1955 (R. D1319). The death sentence was imposed the same day (R. D1322). On April 25, 1955, petitioner's present counsel was appointed by the trial court to represent the petitioner in the prosecution of a writ of error to the Supreme Court of Illinois.[1]

Before the Supreme Court of Illinois, the petitioner contended that the confession was inadmissible because it was involuntarily extracted from him while he was under the influence of drugs, administered to him by a doctor, employed by the police, who had defendant under interrogation. The petitioner did not argue that the drugs were involuntarily administered and without his consent. He did not contend that the medical treatment given him was not proper or that required by good medical practice. It appeared without challenge by the petitioner that the medication, administered to him, was normally used to relieve an acute drug withdrawal case. That Court determined that the confession was voluntary and admissible, overruled other contentions, and, with two Justice dissenting, af-

1. Since that date, same counsel has represented the petitioner in the prosecution of all State and federal proceedings, including the present petition for writ of *certiorari*.

firmed the conviction. *People v. Townsend*, 11 Ill. 2d 30, 36-37.

The petitioner filed his petition for writ of *certiorari* in this Court on August 3, 1957 (O. T. 1957, No. 133, Misc.). In that petition, he represented that the record, made in the Criminal Court of Cook, indicated that hyoscine and scopolamine "are different names for the same drug" (p. 4). The petitioner further declared to this Court that the "drugs were administered to petitioner with his consent and with the avowed intention on the part of the police surgeon to alleviate the heroin withdrawal symptoms" (p. 8). The petition was denied by this Court, with one Justice dissenting, on October 14, 1957. *Townsend* v. *Illinois*, 355 U. S. 850. Rehearing was denied on November 25, 1957. *Townsend* v. *Illinois*, 355 U. S. 886.

II.

In March, 1958, the petitioner filed his petition for post-conviction review. (R. E11-22) in the Criminal Court of Cook County pursuant to the provisions of Chapter 38, Sections 826-831, Illinois Revised Statutes, 1957. In this pleading, he alleged that hyoscine is identical with scopolamine, a drug which is commonly known as "truth serum". He further alleged that this drug, whether alone or combined with phenobarbital, is not the proper medication for a narcotic addict, who is suffering from withdrawal difficulties (R. E15). He further contended that these facts were well known to the police surgeon who injected the drug. He conceded that his trial defense attorneys "were experienced lawyers in the defense of criminal cases" (R. E16). The petitioner further alleged that the police surgeon wilfully withheld from the Court, the prosecuting authorities and from the defense attorneys that he was aware of the identity of the drugs at the time of the injection and that they were

injected into the petitioner not for the purpose of rendering proper medical attention but for the sole purpose of inducing a confession. He continues to aver that the police surgeon and all prosecuting attorneys collaborated together to withhold this information from the petitioner, his counsel and the court (R. E17-18). These facts, it is alleged, did not come to the attention of the petitioner "until they were discovered by Counsel representing Petitioner on review" (R. E19).

This petition was dismissed by the trial court upon motion. The petitioner then prosecuted his petition for writ of error in the Supreme Court of Illinois to review the judgment of dismissal. That court entered an order denying the writ of error. (R. A30-31). The pertinent part of that order reads as follows:

> "The State's motion to dismiss relied upon the fact that petitioner had obtained a full review by this Court on a writ of error, and that our affirmance was *res judicata* as to all claims there raised and likewise as to all claims which could have been raised.
>
> "A study of our opinion on the writ of error disclosed that all of the evidence with respect to the injection of hyoscine and phenobarbital was carefully considered by us in resolving the issue of the validity of petitioner's confession. (*People* v. *Townsend*, 11 Ill. 2d, 30, 35, 44). Thus, it is clear that the issue of the effect of the drug on the confession was before us on the writ of error. The only matter which was not presented then was the fact that hyoscine and scopolamine are identical. In an attempt to escape from the doctrine of *res judicata*, the present petition for a writ of error contends that this fact could not have been presented to us because it was unknown to petitioner and his counsel at the [illegible]. Assuming for the moment the truth of this statement, we are of the opinion that the mere fact that the drug which was administered to petitioner is known by two different names presents no constitutional issue. At the original

trial there was extensive medical testimony as to the properties and effects of hyoscine. If hyoscine and scopolamine are, in fact, identical, the medical testimony as to these properties and effects would be the same, regardless of the name of the drug. In determining the effect of the drug on the validity of petitioner's confession, the vital issue was its nature and its effect, rather than its name. This issue was thoroughly presented, both in the trial court and in this Court. Furthermore, the claim by petitioner now that the State 'suppressed' this identity of hyoscine and scopolamine at the trial is destroyed by reference to the bill of exceptions from the original trial. A State medical witness, on cross-examination by petitioner's counsel stated: 'Scopolamine or hyoscine are the same' (Rec. 1173)."

Thereupon the petitioner filed his petition for writ of *certiorari* in this Court (O. T. 1958, No. 217 Misc.). In substance, he repeated the allegations of his petition for post-conviction review. Contrary to his representations in his first petition for writ of *certiorari*, filed in the previous term, the petitioner now stated "that the circumstances were such that the drug administered to him by the police surgeon was not at his request nor with his consent" (p. 16). This Court denied the second petition on November 10, 1958. *Townsend* v. *Illinois*, 358 U. S. 887.

III.

On December 12, 1958, the petitioner initiated this federal *habeas corpus* proceeding in the United States District Court. The essential allegations of this petition (R. A2-20) are a *verbatim* reproduction of his petition for post-conviction review, with the addition of specific allegations concerning crimes, other than the Boone murder (R. A9-12). He refers to and incorporates the minutes of the coroner's hearing on deaths other than the Boone death. This is the

first time that the petitioner has advanced the coroner's minutes in any proceeding. During the trial proceedings, in the Criminal Court of Cook County, the petitioner successfully resisted the introduction of any testimony of this character. During the preliminary hearing outside the presence of the jury on his motion to suppress, the petitioner and his defense counsel objected to the State's use of these minutes for purposes of impeachment on the ground that such use would "be highly prejudicial". The objection was sustained (R. B188-191). During the trial before the jury, the petitioner successfully objected to any reference by the State to questioning by the police during the evening of January 1, 1954 as to crimes other than the Boone murder (R. B374, C871-872). The district court dismissed the petition (R. A39). On December 17, 1958, the United States Court of Appeals dismissed the appeal. *United States ex rel. Townsend* v. *Sain*, 265 F. 2d 660. In his petition for writ of *certiorari* (O. T. 1958, No. 552 Misc.), the petitioner contended once again that the identity of hyoscine and scopolamine was not known to the petitioner and his trial counsel and that this fact was not revealed to the trial court (p. 4). He further represented in the same pleading (pp. 5-6) that this fact of identity "was not presented in the record made at his trial because this identity was discovered by other counsel who represented petitioner after his trial". On March 9, 1959, this Court granted the petition and, citing *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276, it vacated the judgment of the United States Court of Appeals and remanded the cause. *Townsend* v. *Sain*, 359 U. S. 64.

On remand, the district court received and examined the entire record of the State court proceedings. On June 24, 1959, that court entered its memorandum order, dismissing the petition (R. F133-137). The district judge found that the material allegations of the *habeas corpus* petition were

fairly raised and fully at issue in the State court proceedings and were reviewed and considered carefully by the State's highest court of review. He further found that the petitioner's federally safeguarded rights were accorded full and fair consideration in the State proceedings. The district judge also found that the findings of the State court that the challenged confession was freely and voluntarily given by the petitioner are correct, and that there was no denial of federal due process of law. The United States Court of Appeals affirmed. *United States ex rel. Townsend* v. *Sain*, 276 F. 2d 324. The present petition for writ of *certiorari* followed, and it was granted.

SUMMARY OF ARGUMENT.

The dismissal of the petition by the federal district court without further hearing after it determined, from its independent investigation of the State court records, that the petitioner's federal rights were fully protected and considered by the Illinois courts and that the challenged confession was voluntary, is in accord with well-defined procedural principles. *Brown* v. *Allen*, 344 U. S. 443, 465. In the analysis of the State court record, conflicts of testimony are authoritatively resolved by the state court's adjudication, *Watts* v. *Indiana*, 338 U. S. 49, 51-52, and where the petitioner alleges abuse and mistreatment by state officers, this Court will proceed on the premise that the petitioner was not abused or mistreated by such officials. *Reck* v. *Pate*, 367 U. S. 433, 400.

The record of the State court proceeding supports the determination of the federal district court to the effect that the challenged confession was voluntary. The petitioner was not subjected to continuous and incessant interrogation; the periods of questioning were few and limited in time. When he became ill from narcotics withdrawal, he requested a doctor, who was summoned by the police. The doctor administered a dosage of hyoscine and phenobarbital which is approximately half of the usual and normal adult dose. It was administered for purposes of medication. While it may have served to quiet him, it did not, and could not, overpower him to the point that he did not confess voluntarily on the evening of January 1, 1954. The petitioner does not, and in the light of his expert's testimony, he cannot contend that he was under the influence of the drug when he signed the challenged confession on the afternoon of January 2, 1954 or when he made oral ad-

missions at the inquest on January 4, 1954. Th State court record establishes that the petitioner was able and did make a narrative of events in which he detailed the facts.

The testimony of the petitioner in the Criminal Court of Cook County relative to his physical and mental condition is inconsistent with that of his scientific expert. Certain symptoms which this drug invariably produces, were not mentioned by the petitioner. His testimony regarding the impairment of vision contradicted his expert.

The medical texts, advanced by the petitioner, establish that the medication used is a recognized treatment for narcotics withdrawal difficulties. They further demonstrate that the dose, injected into the petitioner, was approximately one-half of the recommended usual adult dose.

Throughout these protracted proceedings, the petitioner has adopted a vacillating position with reference to both claims and evidence. Procedurally, the petitioner should not be entitled to raise his claim that the police surgeon withheld from the trial court the fact of the identity of hyoscine and scopolamine. The State court record shows that the factual basis for this legal issue, if any, was present in the evidence but the petitioner did not urge the question on his direct review in the Illinois courts. Furthermore, the petitioner should not be allowed to rely upon the minutes of the coroner's inquests of deaths, other than the Boone murder, because he successfully moved to exclude them in the original trial on the grounds that they were "highly prejudicial". Due to his trial maneuver, no Illinois court has ever seen or considered these minutes.

Finally, this Court can reasonably and rightfully consider the inconsistent and vacillating positions, adopted by the petitioner, in its appraisal of the sincerity and plausibility of the petitioner's claim.

ARGUMENT.

The Record of the State Court Proceedings Establishes That the Challenged Confession Was Voluntary and That the Petitioner Was Not Deprived of Any Federal Rights under the Due Process Clause.

The course of action, pursued by the federal district court and approved by the Court of Appeals, has been challenged by the petitioner. It represents no departure in federal *habeas corpus* procedure. On the contrary, it is consistent with all procedural principles and guides, as defined by this Court. The dualism of sovereignties, which is inherent in our national federation of states, gives rise to delicate relationships. Consequently, this Court has adhered to a policy of caution when its power has been invoked to examine the validity of challenged state Court judgments of conviction. It has been recognized that the administration of local criminal justice is the primary responsibility of the several states and that the state and federal courts have the same duty to protect persons from violation of their constitutional rights. Consequently, when a federal district court is exercising its judicial power in a *habeas corpus* proceeding, prosecuted for the avowed purpose of challenging the validity of a state court conviction, the "federal district court may decline, without a rehearing of the facts, to award a writ of *habeas corpus* to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies". *Brown* v. *Allen*, 344 U. S. 443, 465. The petitioner does not enjoy an absolute and unqualified right to a full hearing.

This is wholly within the discretion of the federal district judge. If that judge's determination that the petitioner's federal constitutional rights were protected and satisfied in the state court proceeding does not constitute an abuse of discretion, the district judge is warranted in his denial of relief without any further hearing. *Thomas* v. *Arizona*, 356 U. S. 390, 403.

We submit further that the procedure adopted by the federal district court in this proceeding was within the contemplation of this Court when it granted the petition for writ of *certiorari*, vacated the judgment of the Court of Appeals, and remanded the case. *Townsend* v. *Sain*, 359 U. S. 64. In its memorandum decision, this Court noted the decision in *United States ex rel. Jennings* v. *Ragen*, 358 U. S. 276. In *Jennings*, this Court, citing *Brown*, indicated that a district court must make its independent examination of the record of proceedings in the state courts before dismissal of the petition. We submit that the memorandum decision clearly authorized the district court to proceed in accordance with *Brown*. The federal pleadings were before this Court at the time. If, as the petitioner appears to contend, the district court was to grant a full hearing, it is reasonable to assume that such directions would have been given by this Court.

The basic issue in this controversy concerns the question as to whether the district judge abused his discretion when he decided, from his study of the State court records, that the petitioner's rights were fully protected and considered by the Illinois courts, that the Illinois courts correctly decided that the confession was voluntary, and, accordingly, dismissed the petition. We submit that the record of the State court proceedings fully supports the action of the district court.

This Court has formulated well-defined principles, which

are applicable in the analysis of the state court record. There has been complete agreement that any conflict in the testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes to this Court authoritatively resolved by the state court's adjudication. *Watts* v. *Indiana*, 338 U. S. 49, 51-52. The inquiry of this Court is limited to a study of the undisputed portions of the record. Conflicts in testimony are resolved against the petitioner by the state's adjudication. The underlying *rationale* lies "in the superior opportunity of trial court and jury to observe the witnesses and weigh the fleeting intangibles which may indicate truth or falsehood". *Thomas* v. *Arizona*, 356 U. S. 390, 402. In the presence of a conflict in testimony regarding abuse and mistreatment by state officers, this Court will proceed on the premise that the petitioner was not abused or mistreated by such officials. *Reck* v. *Pate*, 367 U. S. 433, 440.

I.

In accordance with the foregoing legal principles, with all conflicts in testimony resolved against the petitioner, an analysis of the record of the State court proceeding reveals the following facts.

The petitioner injected himself intravenously with two and one-half capsules of heroin at approximately midnight on December 31, 1953 (R. B93, C810). He was arrested by the police about 1:45 A. M. on January 1, 1954 (R. B93). The arresting officers took him to the 2d district police station where a lockup keeper obtained his name, address and other identifying information. His attire was neat. He answered the questions of the lockup keeper clearly and coherently. This was about 2:30 A. M. (R. B95, B251-256).

At the time of his arrest, the petitioner was nineteen years of age and had been a heroin addict since 1952 (R. B-

92-93). In January, 1952, the petitioner was given a psychological examination and a mental examination by order of the Criminal Court of Cook County. The diagnosis, made by the Director of the Behavior Clinic, reflected a character disorder and drug addiction. A psychological I. Q. of 63 was determined for him. (R. C782-785, D1027). When this quotient was translated in terms of his mental I. Q., it attained a range between 75 to 80. Although this was still in the area of below average intelligence and classified him as a mental defective, the petitioner was determined to be legally sane. Moreover, this I. Q. figure compared favorably to the World War II average mental I. Q. of 78 (R. D1027-1030).

After the lockup keeper had taken all the necessary record data, the arresting officers took the petitioner to one of the rooms and questioned him for approximately a half hour concerning various crimes which he denied having committed (R. B96, B253-254, B281, C647, C656). Thereafter, he was placed in the women's cell. About 5:00 A. M. he was transferred to another district station. At the latter station, he was interrogated by no one. He remained there until that evening, lying or reclining on his bunk. He was returned to the 2d district station about 8:30 P. M. (R. B98-100, B170, B269, B270-273).

Shortly after his arrival, a show-up was conducted in one of the rooms and the petitioner was one of four prisoners to appear in that show-up, which lasted about ten minutes. It was at this time that a fight broke out between the petitioner and another prisoner. The petitioner was not injured (R. B102-104, B292, B349-357, B423-428, B476-478, C704-705, C826-827). Up to this time, the petitioner's speech was clear, distinct and coherent (R. B252, B260-261, B263-264, B267, B276, B322, B347, B422-423). He complained to no one that he was ill (R. B99, B267, B270, B273, B323, B355, B358, B422).

The evidence for the prosecution reflects that the petitioner was not questioned about the Boone murder until about 9:00 P. M., Friday, January 1, 1954 (R. B372-373, C647-649, C656). The petitioner admitted that this interrogation occurred before the arrival of the doctor and lasted about a half hour (R. C870-871). It was at this time that the petitioner admitted that he struck and robbed the deceased, for which he now stands convicted (R. C649-652). At this point, the petitioner complained of stomach pains and, upon his request, the police officer called a doctor (R. B358-359).

The Assistant State's Attorney arrived between 9:15 and 9:30 P. M. The doctor had already been summoned by the police. The Assistant State's Attorney did not question the petitioner; he waited for the doctor to arrive. He did not see the doctor at any time during his visit to the police station. According to the assistant prosecutor, the doctor arrived and treated the petitioner between 9:35 and 10:10 P. M. When the assistant saw the petitioner again at approximately 10:10, the petitioner advised him that "he felt much better". The assistant did not have any knowledge of the treatment given the petitioner by the doctor (R. B446-452).

The doctor arrived about 9:45 P. M. (R. B358-366, B447-449). He was directed to the detectives' room by the desk sergeant (R. B223-224, B284, B293-295, B334, B359, B366-368, B429-431, B449, B469, B479). The doctor thoroughly examined the petitioner about the body, and observed a cold perspiration over the petitioner's face, neck, body and arms. He ascribed the petitioner's symptoms to drug addiction and withdrawal (R. B212-215).

Thereupon, the doctor prepared a mixture of one-eighth grain of sodium phenobarbitol and 1 230 grain, which is less than 0.29 mgm., of hyoscine hydrobromide, dissolved it

in 2 cc's of saline solution and injected it into the petitioner (R. B112-113, B214-215, B240, D981-982, D988-989). This solution was injected into the shoulder muscle of the petitioner's left arm (R. B368, D982) even though the petitioner asked that it be injected into his wrist (R. B215). The doctor left four one-quarter grain phenobarbital tablets with instructions to take two around midnight and the others in the morning. The petitioner took two that night and the remainder the next day (R. B114-115, B126, B198, B216, B235, C835, C850-851).

After the doctor left about 10:30 P. M., the Assistant State's Attorney visited the petitioner and questioned him for about twenty-five minutes (R. B371-372). Thereafter, petitioner, the Assistant State's Attorney, Officers Fitzgerald and Cagney and a court reporter, employed by the State's Attorney's office, went into a larger room. Petitioner's challenged confession concerning the Boone murder was dictated to the court reporter for about ten minutes, beginning about 11:15 A. M. Only the assistant questioned the petitioner, who answered clearly, distinctly, and coherently (R. B282, B298-299, B301, B370-373, B391-392, B304, B374-375, B841). Shortly thereafter, the Assistant State's Attorney left (R. B726-727).

The petitioner was taken to the State's Attorney's Office on January 2 about 1:00 P. M. (R. B307) where he met the Assistant State's Attorney who had taken the statement the night before (R. B441). The statement, which the defendant had given the night before, was then read to him after a copy thereof had been placed in his hands (R. B442). The petitioner appeared to be following the assistant as the latter read from the original; he turned the pages as the assistant turned the pages. After it had been read to him, he signed each and every page of it and initialed the caption of the case. The Assistant identified the signature. The petitioner did not appear sleepy or complain in any manner.

He was not abused, threatened or promised anything to obtain his signatures (R. B286-289, B308-310, B340-341, B376-379, B440-455).

The doctor saw the petitioner a second time on Sunday evening, January 3, when the petitioner told him that the "medicine I gave him the other night didn't help him any" (R. B221). The doctor gave him two more quarter grain phenobarbital tablets (R. B238-239).

On January 4, 1954, the petitioner testified at the coroner's inquest, which was an open hearing and was attended by his sister. There, he was sworn, and was advised by the deputy coroner of his right not to testify. Nevertheless, he chose to do so and again confessed to the Boone murder (R. B143-148, B178-181, B184, B316-317, B380-381, B383-385, B433-435, B445, B488, C692, C905).

The petition for writ of *habeas corpus* alleges that the medication was administered by the police surgeon without the petitioner's consent and that it was improper. The record of the State court does not support any such claim. The petitioner requested the services of a doctor. This necessarily implies a request for medical treatment. This surgeon, who had examined about twenty-thousand narcotics addicts and had treated about six to seven thousand cases of narcotics withdrawal, had administered the same injection and treatment to approximately fifty percent of those cases (R. B217-218). As noted previously (*ante*, p. 24), the petitioner did not argue to the Supreme Court of Illinois that the drugs were involuntarily administered and without his consent. The propriety of the medication was not questioned or challenged. *People* v. *Townsend*, 11 Ill. 2d 30, 36-37. As a matter of fact in his first petition for writ of *certiorari*, filed in this Court on August 3, 1957 (O. T. 1957, No. 133, Misc., p. 8) he expressly declared to this Court that the "drugs were administered to petitioner

with his consent and with the avowed intention on the part of the police surgeon to alleviate the heroin withdrawal symptoms".

We submit that the petitioner cannot challenge the propriety of the use of the drug. Fein, the author of *Modern Drug Encyclopedia and Therapeutic Index*, 8th Ed., (1960), The Reuben H. Donnelley Corporation, New York, a scientific treatise advanced by the petitioner in his brief, states at page 1116 that hyoscine or scopolamine is a *recognized* treatment for the withdrawal symptoms of narcotic or alcoholic addicts. This is conceded by the petitioner at p. 21 of his brief.

In his brief, the petitioner makes references to delirium and poisoning. There is no testimony in this record that the petitioner was delirious or poisoned and the petitioner gave no such testimony. He could not have been because the administered dose was so far below the recommended dosage. Any drug, including commercial aspirin, will produce a toxic effect if the administered dose is excessive. That the dose administered in this case was not only not excessive but, on the contrary, far below the recommended dosage is fully supported, once again, by the petitioner's own medical authorities. Fein at P. 1116 of his *Encyclopedia* reports that the recommended sedative dose is 0.5 mgm. (1 120th gr.) to 1.1 mgm. (1 60th gr.). *The Pharmacopoeia of the United States*, 16th Ed. (1960), Mack Publishing Co., Easton, Pa. (p. 637) in the case of scopolamine hydrobromide, designated the "usual dose—subcutaneous, 0.6 mgm." Goodman and Gilman in *The Pharmacological Basis of Therapeutics*, Second Edition, The Macmillan Company, New York (1955) (p. 554), report the adult dose at 0.5 mgm. These same authors report that this drug is used to prevent motion and air sickness. Studies reflect that 0.3 mgm. has been used with other drugs, and no impairment of military efficiency has been observed (p. 556).

The petitioner is now faced with the fact that his scientific authorities offer no support to his contentions. Hyoscine or scopolamine is a recognized treatment for withdrawal symptoms of narcotic addicts. While this drug, like any other drug, can produce toxic effects in case of excessive use, these same medical authorities agree that the usual adult dose is 0.5 to 0.6 mgm. The dose which the petitioner received, however, was 1.230th of a grain—less than 0.29 mgm. (R. B215). This is approximately half of the usual adult dose. Once again, the petitioner's case must be reduced to the State court record of the trial in order to ascertain what effect, if any, the medication had upon him.

Dr. Mansfield, the police surgeon, a man of broad experience with narcotic addicts and their withdrawal problems, testified that hyoscine is used to sedatize drug addicts. The addict in withdrawal suffers from a nervous reaction (R. B247). The phenobarbital, which is also a sedative, combines very well with hyoscine, in the proportion and quantity used, to quiet and pacify the addict without putting him to sleep (R. B215-216, B228). The combination given rests and relaxes the subject (R. B227, B243, D1019). He could recall no case in his experience where his use of hyoscine produced amnesia. The injection, administered to the petitioner, could not have resulted in a loss of memory, impaired his vision, affected adversely his mental condition to the point of depriving him of his will, or caused him to sleep. He did not use the drug for any of these purposes (R. B216, B218-220, B228, B231-232, D982-983, D1001, D1010). In order to narcotize the petitioner, the administration of three or four grains of phenobarbital (R. B233) or a ½ grain of hyoscine (R. D988-990) would be required. One and one-half to two grains of phenobarbital would be necessary to put him to sleep (R. B243). The inducement of amnesia would require

1 100 grain of hyoscine, the normal dose, *plus* another 1 60 gr. or a large dose of phenobarbital and hyoscine combined (R. D1008-1009). On cross-examination, he denied that he administered any "truth serum" or anything he considered "truth serum" to the petitioner (R. B228).

Testifying on behalf of the petitioner, Dr. Proctor is not a licensed physician (R. B495-499). He admittedly never prescribed treatment for drug addiction and never observed the effect of hyoscine on human beings. His experience was limited to text books (R. C564-566). He considered the hyoscine administered here in an amount less than 0.29 mgm. *well within normal range* (R. D1092). He considered the ½ grain phenobarbital given hypodermically and a ¼ grain a *very low dose* (R. D1093). One to one and one-half grains would be necessary for hypnotic or sleep-producing effects (R. D1090-1091). In his opinion, hyoscine administered to an addict, would affect consciousness and memory (R. C506-507, C575, D1087, D1094). The drug affects a person's vision in that it causes cycloplegia wherein one sees objects more clearly at a distance than close up (R. C537-538, 568). The effects of hyoscine last from five to eight hours (R. C538-540, C533-534, D1089, D1124). In response to a hypothetical question, purportedly relating to petitioner, his opinion stated that the injection resulted in impairment of vision and ability to reason. The hypothetical person suffered from amnesia and partial consciousness (R. C506-507, D1119-1121, D1125).

Dr. Hoffman, a specialist in nervous and mental disease, also testified on behalf of the State. He had used hyoscine as well as phenobarbital in his practice many times and observed no case where hyoscine *in normal dosage* caused amnesia (R. D1157-1159). With reference to the hypothetical person, *i. e.*, the petitioner, the injection in question could not have caused amnesia or put the subject to sleep (R. D1160-1165).

The gist of Dr. Proctor's testimony appears to be that, despite the normal dose of hyoscine and the very low sedative dose of phenobarbital, amnesia was produced. It must be remembered that this was the testimony of a non-physician, whose experience was limited to texts and not the observation of the effect of this medication on human beings. It was disputed by two medical doctors, who enjoyed years of experience in this field. Dr. Proctor's limited qualifications must have been recognized and appreciated by the petitioner because in his brief, filed in the United States Court of Appeals, he "admits that Dr. Proctor was not qualified to have his opinion taken in preference to that of Dr. Mansfield." *United States ex rel. Townsend* v. *Sain*, 276 F. 2d 324, 329, n. 4. At any rate, the question of the presence of amnesia in the petitioner is disputed in the evidence, which is authoritatively resolved against the petitioner by the State court's adjudication. *Watts* v. *Indiana*, 338 U. S. 49, 51-52. This court will proceed on the premise that such amnesia was not present in the petitioner. *Reck* v. *Pate*, 367 U. S. 433, 440. Moreover, this claim by the petitioner is open to serious question when one remembers that in a prior trial he testified under oath that he had *seen and given a statement* to the Assistant State's Attorney during the evening of January 1 at the 2d district police station (R. C877-902). This contradicts any claim of amnesia that he presently may make.

We submit that, on the basis of this State court record, the district court judge did not abuse his discretion when he found that the State court determination on the issue of voluntariness was correct and that the petitioner was not deprived of federal due process. On this record, his dismissal of this action without further hearing was well within his discretion. Although the petitioner was of limited intelligence, his quotient compared favorably with

the World War II average mental I. Q. of 78. He was found to be legally sane (R. D1027-1030). The petitioner was not subjected to continuous and incessant interrogation. On the contrary, the periods of questioning were very few and limited in time. He spent one whole day without any disturbance whatever. If a 0.3 mgm. dose could be administered to military air personnel without impairment of efficiency, how could a lesser dose affect the petitioner to deprive him of voluntariness? While the medication may have served to quiet him, it did not overpower him to the point that he did not act freely and voluntarily when he confessed on the evening of January 1. Prior to the administration of the treatment, and before the onset of his withdrawal difficulties, he admitted the robbery and murder of Boone, and this admission was the subject of cautionary instructions to the jury (R. D1274-1275). The petitioner's sworn testimony in a prior trial (R. C877-902) that he had seen and given a statement to the assistant prosecutor cannot be reconciled with any present claim of amnesia. The determination of the Supreme Court of Illinois that the challenged confession was voluntary was justified because this record clearly establishes that the petitioner was capable and did in fact make a narrative of past events in which he coherently detailed the facts, in answer to questions, concerning his commission of the crime charged. *People* v. *Townsend*, 11 Ill. 2d 30, 43. The judicial standard employed by that Court is not novel. *People* v. *Waack* (1950), 100 Cal. App. 2d 253; 223 P. 2d 486. A similar view has been adopted in the treatment of cases involving a confession by one who may be under the influence of alcohol. *McAffee* v. *United States* (1940), 111 F. 2d 199; cert. denied 310 U. S. 643.

Moreover, the petitioner did not contend either in the district court or in the Court of Appeals, and he does not contend now that his memory was in any way im-

paired on the afternoon of January 2 when he signed the challenged confession after it was read to him, or on January 4 when he admitted the crime at the inquest. Such a contention would be not only fruitless but groundless in view of the testimony of his expert, Dr. Proctor, that the effects of hyoscine endure from five to eight hours (R. C538-540, C533-534, D1089, D1124).

Finally, the contention that the police surgeon withheld the fact that hyoscine and scopolamine are identical from the Court and defense counsel, has no merit whatever. Although this claim constituted one of his primary contentions in both the State post-conviction proceeding and in this *habeas corpus* action, the petitioner no longer appears to address any argument to it. We suggest that the memorandum order of the Supreme Court of Illinois (*ante*, pp. 26-27), denying the writ of error, conclusively disposes of this question. Furthermore, the experienced trial counsel's cross-examination of the police surgeon on "truth serum" (R. B228) as well as his thorough examination of all expert witnesses clearly reflects that the qualities of the medication and the effect it might produce in the petitioner were widely explored in the trial of this case. The State Court record of the trial destroys this contention.

II.

A critical comparison of the testimony of the petitioner with that of his expert witness, Dr. Proctor, will demonstrate that the medication, administered by the police surgeon, did not produce such effects in the petitioner as would render him incapable of voluntary action. An analysis of petitioner's testimony in the light of his authorities will lead to the same conclusion.

When the surgeon visited the petitioner on Sunday evening, the petitioner complained that the previously pre-

scribed medicine was of no help to him (R. B221). Since effective doses of the drugs in question settle and calm a person, it appears that the petitioner did not observe any effect of the drugs. One must conclude that no effect on his central nervous system and, hence, on his behavior was produced.

The properties of scopolamine are discussed in *The Pharmacological Basis of Therapeutics* by Goodman and Gilman, one of the texts cited by the petitioner. In pp. 546-550, they report that this drug inhibits the glandular secretion of the nose and mouth and thus cause a drying of the mucous membranes of the respiratory tract. This is the basis for its chief use in preanesthetic medication. The salivary secretions are markedly inhibited by this drug. This causes a dryness of the mouth and difficulty in swallowing and talking. The sweat glands are inhibited and this causes the skin to become hot and dry. *The petitioner testified to none of these symptoms.*

Dr. Proctor testified that hyoscine causes cycloplegia or loss of ability to accommodate vision. This causes the subject to see distant objects more clearly than near objects (R. C537-538, 568). Goodman and Gilman in the cited text (p. 545) state that, after the use of this drug, the optical lens is *fixed for far vision and near objects are blurred.* The petitioner, however, testified that *he could see no more than two feet in front of himself* (R. B118-119).

We submit that the petitioner's description is inconsistent with the known qualities of hyoscine. Accordingly, we suggest that the dosage administered to the petitioner produced no effect on his central nervous system or his behavior, and that it did not render him incapable of free and voluntary action.

III.

With the commencement of the petition for post-conviction review in the Criminal Court of Cook County in March, 1958 (R. E11-22), the petitioner embarked upon a new approach to this controversy. The gist of that claim lies in his allegation that the fact that hyoscine and scopolamine were identical was deliberately withheld from the trial court and the petitioner by the police surgeon and the prosecuting authorities. The same claim is advanced in the petition for writ of *habeas corpus* (R. A2-20). The Supreme Court of Illinois, in its detailed memorandum order (R. A30-31), (*ante*, pp. 26-27) demonstrated the error of his factual allegations and denied the writ of error on the ground that the judgment in the first writ (*People* v. *Townsend*, 11 Ill. 2d 30), was *res judicata*. The trial record fully supports this order. It shows that defense counsel, whom the petitioner continuously describes as being experienced in the defense of criminal cases, thoroughly explored the properties and qualities of the drug and the question as to whether, in fact, a "truth serum" had been administered. This is not a case where something is discovered after trial and judgment *dehors* the record. Nor is it a case where the State did not provide a remedy. The Supreme Court of Illinois correctly determined that the nature of the drug and its effect on the petitioner, and not the label, constituted the critical issue. The identity of the two labels was disclosed to defense counsel and the trial court (R. D1173). If we assume, *arguendo*, that the petitioner had some legal issue, the evidentiary basis for any argument on that issue existed in that trial record when he prosecuted his direct review to the Supreme Court of Illinois by way of writ of error. He chose not to pursue such argument. On that state of the record, a serious question arises as to whether a person, as the petitioner, who has every opportunity to urge a claim but fails to do so and is held, in a subsequent state post-conviction proceeding to have waived it under the doctrine

of *res judicata*, can properly pursue the claim in a federal *habeas corpus* proceeding. To avoid the subversion of state criminal justice, we submit that the answer should be in the negative. Compare: *Brown* v. *Allen*, 344 U. S. 443, 485-487, 503.

During this same period, there was another occurrence which offers some insight into the petitioner's attitude toward post-conviction remedies, state as well as federal. After the challenged judgment of conviction was affirmed by the Supreme Court of Illinois, he prosecuted his first petition for writ of *certiorari* in this Court (O. T. 1957, No. 133, Misc.), wherein he expressly declared that the "drugs were administered to petitioner with his consent and with the avowed intention on the part of the police surgeon to alleviate the heroin withdrawal symptoms" (p. 8). In the very next term of this Court, the petitioner filed his second petition (O. T. 1958, No. 217, Misc.) seeking a review of the Illinois denial of a writ of error in the post-conviction proceeding. In this petition, he represented "that the circumstances were such that the drug administered to him by the police surgeon was not at his request nor with his consent" (p. 16). He further averred that he could not raise this question in his first review by the Supreme Court of Illinois because the facts did not come to the attention of his counsel until completion of the review (p. 7). The timing is important. By his own allegation, the alleged facts became known to the petitioner when they were discovered by counsel on the first review. That review was completed *before* he filed any petition for writ of *certiorari* in this Court. Why then, with his alleged knowledge of the purported new facts, did he persist in conceding that the drug was administered with his consent and for proper medical purposes in his first petition and then adopt a contradictory position in the second petition? Consent, like coercion, is a reality even though it is a subjective act. As soon as the act

of consent with all its attendant circumstances occurs, it is completed. It becomes history. No words in a subsequent pleading can change it. It cannot reasonably and realistically be described as consent in one petition and as a lack of consent in a second petition, filed one year later.

With the filing of the federal *habeas corpus* proceeding, the petitioner, for the *first* time, referred to and incorporated by reference, the minutes of the coroner's inquests on deaths other than the Boone murder (R. A9-12). He alludes to them now in his effort to establish the involuntary nature of his confession and the invalidity of the judgment of conviction for the Boone murder. This represents a complete reversal of tactics on the part of the petitioner. During the original trial, he and his concededly experienced defense counsel vigorously and successfully moved the trial judge to exclude any evidence of statements or inquest transcripts of other crimes (R. B188-191, B374, C871-872). Defense counsel characterized the coroner's minutes as being "highly prejudicial". This evidence has never been considered by any Illinois Court because the petitioner had it excluded. Since it was known to the petitioner as early as the original trial, it should not be used now to support federal *habeas corpus*. *Brown* v. *Allen*, 344 U. S. 443, 480. This procedural rule should prevail particularly in the case of one who has, by his motions for exclusion, successfully prevented the consideration of such evidence by any state court.

Moreover, we submit that the *motive* for the petitioner's trial tactics, especially with reference to the coroner's minutes, presently has a bearing on this controversy and merits consideration by this Court. Why did the petitioner describe these minutes as "highly prejudicial" when he objected to their use by the State for purposes of impeachment? This was a preliminary hearing on the issue of voluntariness. The jury was not present, and the trial judge

was certainly qualified to consider only competent evidence in reaching his decision. We submit that it can reasonably be inferred that the petitioner recognized and realized that the minutes contained damaging *voluntary* disclosures. Hence, he had them excluded.

Federal *habeas corpus* is designed to provide a remedy whereby a prisoner can test the constitutional validity of a state criminal proceeding. It is not intended to provide an appeal or a second trial. The validity of the state judgment must be tested by the state court record. Though a petitioner may decide to pursue a course of inconsistency and vacillation, he must accept the consequences of such practice. We suggest that this Court can reasonably and rightfully consider such practice of inconsistency and vacillation when it is appraising the sincerity and the plausibility of a petitioner's claim in the *habeas corpus* proceeding.

CONCLUSION

In view of the foregoing, the federal district court was correct in its findings and order of dismissal and the affirming judgment of the United States Court of Appeals should be affirmed.

Very respectfully submitted,

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